

**Chauffeurs, Teamsters and Helpers Local Union  
No. 776, a/w International Brotherhood of  
Teamsters, AFL-CIO<sup>1</sup> and Pennsy Supply, Inc.  
Case 4-CC-1918**

April 28, 1994

**DECISION AND ORDER**

BY MEMBERS STEPHENS, DEVANEY, AND COHEN

On April 29, 1993, Administrative Law Judge William A. Pope II issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel and the Charging Party each filed answering briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in the light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,<sup>2</sup> and conclusions and to adopt the recommended Order.

**ORDER**

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Chauffeurs, Teamsters and Helpers Local Union No. 776, a/w International Brotherhood of Teamsters, AFL-CIO, Harrisburg, Pennsylvania, its officers, agents, and representatives, shall take the action set forth in the Order.

<sup>1</sup> On November 1, 1987, the Teamsters International Union was readmitted to the AFL-CIO. Accordingly, the caption has been amended to reflect that change.

<sup>2</sup> In adopting the judge's finding that Pennsy Supply, Inc. did not perform struck work and did not forfeit its neutral status, we rely on, in addition to the cases cited by the judge, *Service Employees Local 32-B-32-J (Dalton Schools)*, 248 NLRB 1067, 1069 (1980). In that case, Dalton had a maintenance contract with Allied. The union struck Allied and picketed Dalton, contending that Dalton's performance of the maintenance work constituted the performance of "struck work." The Board rejected that argument, finding instead that by performing the cleaning work itself during the period of the strike, Dalton was attending to its own needs as a neutral employer. Its performance of the work was of no economic benefit to Allied and did not permit Allied to escape the economic impact of the strike.

In this case, as the judge found, there is no evidence that Drivers had a contractual right to perform the work at issue. Drivers did not therefore transfer the work to Pennsy that it would have performed but for the strike. By performing the work itself, Pennsy was attending to its own needs as a neutral employer, continuing its operations as before the strike. There was no benefit to Drivers, Inc., and Drivers was not thereby enabled to escape the economic impact of the strike.

*Timothy J. Brown, Esq.*, for the General Counsel.  
*Ira H. Weinstock, Esq.* and *Wendy Bowie, Esq.*, of Harrisburg, Pennsylvania, for the Respondent.  
*Arthur M. Brewer, Esq.*, of Baltimore, Maryland, for the Charging Party.

**DECISION**

WILLIAM A. POPE II, Administrative Law Judge. The complaint, filed on March 28, 1991, alleges that from on or about November 8 to on or about December 6, 1990, the Respondent, Chauffeurs, Teamsters and Helpers Local Union No. 776 (Local Union 776), committed unfair labor practices in violation of Section 8(b)(4)(i) and (ii)(B) of the National Labor Relations Act (the Act), by picketing the Harrisburg, Pennsylvania facility of Pennsy Supply, Inc. (the Charging Party or Pennsy Supply), in order to induce Pennsy Supply's employees to refuse to perform work there, and by picketing construction sites in Harrisburg and Hershey, Pennsylvania, in order to induce employees of Pennsy Supply and other companies to refuse to perform work at the construction sites, and for the purpose of forcing the other companies to refuse to do business with Pennsy Supply. The original charge was filed on November 13, 1990. Trial was held before me on 17 days between June 19, 1991, and February 21, 1992, in Harrisburg, Pennsylvania.

**Background**

Pennsy Supply, Inc. sells and delivers building materials, including cement, sand, gravel, limestone, and asphalt, to the construction industry in the Harrisburg and Hershey, Pennsylvania area. Its offices and main facility are located on Paxton Street, in Harrisburg, and it operates several other concrete plants, blacktop plants, and quarries in the Harrisburg area. In November 1990, Pennsy Supply operated a fleet of approximately 135 vehicles of different kinds to deliver concrete, blacktop, and other construction and building products, including approximately 55 transit concrete mixer trucks, 50 to 55 tri-axle dump trucks, 12 dump trailers, 2 road oilers with tankers, 4 tractor and cement trailers, and various pickup and fuel trucks.

In Early November 1990, Pennsy Supply employed approximately 40 drivers of its own, and leased most of the additional drivers it needed to operate its fleet of vehicles on a daily basis from another company, Drivers, Inc. During the busiest time of the year in the construction industry in the Harrisburg area, Pennsy Supply used a daily average of 70 to 75 Drivers, Inc. drivers, who were dispatched in Pennsy Supply vehicles primarily from its Paxton Street facility.

Pennsy Supply is a wholly owned subsidiary of Nine, Ninety-Nine, Inc., one of a number of corporations owned by Robert M. Mumma until his death in 1986, and now owned by his wife and children.<sup>1</sup> His widow, Kim Barbara Mumma, is the president and chief executive officer of Pennsy Supply, and his daughter, Lisa Mumma-Morgan, is general counsel and a vice president of Pennsy Supply. At all times relevant to this case, Donald Eshleman was the executive vice president of Pennsy Supply, Ward Rice was the vice president of operations, Ronald Nye was the vice president of aggregate and blacktop sales, and Harry G. Lake, Jr., was the vice president of finance and administration. Eshleman, Rice, Nye, and Lake have no ownership interest in Pennsy Supply or in any of the Mumma family corporations.

<sup>1</sup> These corporations include Mumma Realty Associates, Inc.; Robert M. Mumma, Inc.; Elco Concrete Products, Inc.; Kim and Kim, Inc.; Hummelstown Quarries, Inc.; and, Morgan and White, Ltd.

Drivers, Inc. operates from a rented trailer and employee parking lot located on a parcel of land situated entirely within Pennsy Supply's Paxton Street facility. Drivers, Inc. and Pennsy Supply jointly lease the parcel of land from another Mumma family corporation, Mumma Realty Associates, which apparently owns the entire tract of land making up Pennsy Supply's Paxton Street facility. The balance of the parcel not used by Drivers, Inc. is used by Pennsy Supply. Access to Drivers, Inc.'s trailer and parking lot must be through one of the four entrances to the Paxton Street facility. The entrance closest to Drivers, Inc.'s trailer and parking lot, and the entrance designated for the use of Drivers, Inc. and its employees is the Sycamore Street entrance.

Robert M. Mumma formed Drivers, Inc. as a separate corporation for the purpose of supplying truckdrivers needed by Pennsy Supply, and another of his corporations, Robert M. Mumma, Inc.<sup>2</sup> Drivers, Inc. has had a collective-bargaining agreement with Teamsters Local Union 776 since sometime in the 1970s. The most recent collective-bargaining agreement was signed in April 1991. The preceding agreement which it replaced expired on August 31, 1990. The drivers employed by Pennsy Supply have never been represented for collective-bargaining purposes by Local Union 776.

In 1985, Robert M. Mumma sold his interest in Drivers, Inc.<sup>3</sup> to three Pennsy Supply vice presidents, Harry G. Lake, Jr., Ronald Nye, and Ward Rice, for \$3600.<sup>4</sup> The sales agreement was oral. Drivers, Inc. had no physical assets, and nothing other than the purchase money and stock certificates changed hands. The parties to this proceeding stipulated that prior to the 1985 sale Pennsy Supply and Drivers, Inc. were joint employers under the Act.

At the time of the sale, all of Drivers, Inc.'s business was leasing drivers on an hourly or daily basis, as needed, to Pennsy Supply and Robert M. Mumma, Inc. The new owners reached an understanding with Robert M. Mumma that Drivers, Inc. would continue leasing drivers to Pennsy Supply; however, it was not contemplated that Pennsy Supply would have exclusive use of Drivers, Inc.'s drivers. During the first year under the new ownership, Drivers, Inc. did a small amount of work for other companies but the majority of its business as high 98 to 99 percent in recent years, continued to be with Pennsy Supply and Robert M. Mumma, Inc.

After the death of Robert M. Mumma in 1986, his widow, Barbara Mumma, who took over as president of Pennsy Supply and other Mumma family-owned corporations, including Robert M. Mumma, Inc., orally agreed to continue paying Drivers, Inc. under the compensation arrangement which the new owners had reached with her husband.<sup>5</sup>

At all times relevant to this proceeding, Harry G. Lake, Jr. was president of Drivers, Inc., Ward Rice was vice president

and secretary, and Ronald Nye was the treasurer. In the spring of 1987, the three owners hired Charles Welsh as the general manager of Drivers, Inc. Minutes of the board of directors of Drivers, Inc. show that Charles Welsh was made vice president and general manager on August 31, 1987, with responsibility for all day-to-day activities of Drivers, Inc.

### Issues

The complaint alleges that the Charging Party, Pennsy Supply, Inc., was engaged in supplying concrete and other building materials to three construction sites in the Harrisburg-Hershey, Pennsylvania area, and that from on or about November 8 through December 6, 1990, the Respondent Union at various times picketed Pennsy Supply's Harrisburg facility and three construction sites in order to induce and encourage Pennsy Supply's employees to refuse to perform work at its Harrisburg facility, and to induce and encourage employees of other companies at the construction sites to refuse to perform work at the sites and to force or require their employers to cease doing business with Pennsy Supply, in violation of Section 8(b)(4)(i) and (ii)(B) of the Act.

General Counsel and the Charging Party, Pennsy Supply, Inc., contend that the violations of the Act occurred while Respondent Teamsters Local Union 776 and employees of Drivers, Inc. who were represented for collective-bargaining purposes by Teamsters Local Union 776, were on strike against Drivers, Inc. a separate company which supplied drivers to Pennsy Supply to drive its cement mixers and other types of trucks. They argue that the evidence shows that the Respondent Union's picketing of Pennsy Supply's Paxton Street facility and construction sites where it delivered its products violated the Act because Pennsy Supply was a secondary employer or neutral. General Counsel and the Charging Party conclude that the evidence shows that Pennsy Supply and Drivers, Inc. are not joint employers, alter egos, allies, or a single employer, and that Pennsy Supply did not perform struck work during Respondent's strike against Drivers, Inc. As to two other issues which arose during the hiring, they argue that the testimony of witness Lisa Mumma-Morgan should not be barred because she violated the witness sequestration rule in effect during the hearing, and Respondent Union's request for an adverse inference should not be granted because Pennsy Supply refused to comply with an order directing compliance with a subpoena duces tecum.

Respondent argues that the General Counsel has failed to establish that the Union carried on picketing at the Postal Service construction site on November 17, 18, or 19, 1990, and therefore, the Union is entitled judgment in its favor as to those dates. Respondent contends its picketing while on strike against Drivers, Inc., did not violate the Act, because the evidence shows that its picketing was legal under a variety of alternative theories.

First, Respondent argues that the evidence shows that Pennsy Supply, Inc. and Drivers, Inc. are a single employer under the Act because there is functional integration of their operations at every level, the same persons control their labor relations, and they share common management at both the executive and lower levels of management. It is not necessary to show that common ownership to prove single employer status where the evidence shows that two companies act as one company.

<sup>2</sup> A PUC regulated company owned by Robert Mumma and engaged in the business of hauling heavy equipment for various contractors and builders.

<sup>3</sup> Drivers, Inc. was apparently owned by Pennsylvania Supply Company, the principal owner of which was Robert M. Mumma. Pennsylvania Supply Company was liquidated in 1986.

<sup>4</sup> According to Harry G. Lake, Jr., Robert Mumma wanted to sell Drivers, Inc. for estate planning purposes.

<sup>5</sup> According to Harry G. Lake, Jr., he asked Barbara Mumma for a written contract after the death of her husband in 1986, but she declined, saying that she was satisfied to continue with the arrangement Drivers, Inc. had with her husband.

In the alternative, the evidence shows that Pennsy Supply, Inc. and Drivers, Inc. are joint employers because Pennsy Supply's supervisors assign work to the employees of Drivers, Inc., the two companies share a "sameness of workplace conditions," Pennsy Supply establishes working rules for the employees of Drivers, Inc. and has the authority to discipline Drivers, Inc.'s employees for violating Pennsy Supply's rules. Some Drivers, Inc. drivers continued to drive Pennsy Supply trucks during the strike, and it was not possible to tell from a distance whether a Pennsy Supply employee or Drivers, Inc. employee was driving a particular truck. Any picketing that occurred, argues Respondent, was permissible because Pennsy Supply and Drivers, Inc. are joint employers.

Alternatively, Respondent argues that Pennsy Supply and Drivers, Inc. are alter egos. In support of this position, Respondent contends that the evidence shows Pennsy Supply and Drivers, Inc. (which were admittedly joint employers prior to the 1985 sale), before and after the sale, shared substantially identical management, business purposes, operations, equipment, customers, supervision, and ownership. Finally, Respondent argues, as another alternative, that Pennsy Supply and Drivers, Inc. are allies. Respondent contends that Pennsy Supply's neutrality was compromised because the two employers are a single enterprise, but, regardless of that fact, during the strike, Pennsy Supply employees performed struck work, or the work normally performed by Drivers, Inc. drivers.

Two collateral issues were raised during the hearing. Respondent argues that Lisa Mumma-Morgan's testimony should be stricken because she failed to comply with witness sequestration order that was in effect during the trial, and an adverse inference should be drawn against Pennsy Supply and the General Counsel because Pennsy Supply refused to comply with the administrative law judge's order to disclose to the Respondent certain blacked-out figures on certain Pennsy Supply insurance policies supplied under subpoena.

Bargaining over a new collective-bargaining agreement between Local Union 776 and Drivers, Inc. started in mid-August 1990 and continued at intervals until the morning of on or about November 7, 1990,<sup>6</sup> when a number of Drivers, Inc. drivers gathered outside the Sycamore Street gate and refused to work. The work stoppage turned into a strike by Teamsters Local Union 776 against Drivers, Inc.<sup>7</sup> and continued until Local Union 776 and Drivers, Inc. signed a new agreement on April 14, 1991. Approximately four Drivers,

<sup>6</sup> Witnesses did not agree on when the work stoppage started. Donald Eshleman, Pennsy Supply's executive vice president, and Harry G. Lake, president of Drivers, Inc., and a vice president of Pennsy Supply, both said the work stoppage began on November 7, 1990. Charles Welsh, the general manager of Drivers, Inc. at different times, used the dates of November 15 and November 5. Daniel Witmer, a driver for Drivers, Inc. and Local 776's union steward at Drivers, Inc. and Sherry Bounoutas, also a driver for Drivers, Inc., testified that the strike began on November 8, 1990. On the record before me, I find that the work stoppage began on November 7, 1990, and that pickets for Local Union 776 were present at all four gates to Pennsy Supply's Paxton Street facility on November 8.

<sup>7</sup> It appears that Local Union 776 did not plan the strike in advance of the work stoppage initiated by the Drivers, Inc. drivers on the morning of November 7.

Inc. drivers continued to work during the strike.<sup>8</sup> Drivers, Inc. did not hire replacement drivers during the strike.

From on or about November 7 to December 5, 1990,<sup>9</sup> members of Local Union 776 steadily picketed the entrances to Pennsy Supply's Paxton Street facility, and intermittently picketed entrances to three construction sites in the Harrisburg-Hershey area where Pennsy Supply delivered concrete.<sup>10</sup> The picketers carried or wore signs reading:

TEAMSTERS LOCAL 776  
ON STRIKE  
AGAINST  
DRIVERS, INC.  
UNFAIR LABOR PRACTICES  
NO OTHER EMPLOYERS INVOLVED

Pennsy Supply's Paxton Street facility has four entrances, three on Paxton Street,<sup>11</sup> and one on Sycamore Street, which runs parallel to Paxton Street. The Sycamore Street entrance is the only entrance to the Paxton Street facility which is designated for use by Drivers, Inc. and its employees.<sup>12</sup> Donald Eshleman, Pennsy Supply's executive vice president, observed picketing at the Sycamore Street entrance on November 7, 1990, and by November 8, 1990, picketing by Local Union 776 had spread to the three Paxton Street entrances, as well.<sup>13</sup> The picketing at Pennsy Supply's Paxton Street facility continued until on or about December 5, 1990, usually 5 days a week from Monday through Friday. The picketers walked in front of the four entrances, carrying or wearing signs like those described above. Eshleman stated that he recognized some of the picketers as employees of Drivers, Inc.

On November 13, 1990, Pennsy Supply's labor counsel sent a letter to Thomas B. Griffith, president of Local Union 776, stating that effective immediately no Drivers, Inc. drivers would be used to drive Pennsy Supply vehicles to six construction sites, including three which figure in this case: the Hershey Foods Corporate Center at Sand Beach Road;

<sup>8</sup> Charles Welsh testified that one concrete mixer driver and three dump truck drivers continued to work throughout the strike.

<sup>9</sup> In a letter dated on or about December 5, 1990, Union President Griffith made an offer to return to work, which Drivers, Inc. General Manager Charles Welsh turned down.

<sup>10</sup> The picketers apparently knew when Pennsy Supply concrete mixers were on their way to the construction sites by monitoring the radio frequencies used by Pennsy dispatchers to communicate with the concrete mixer drivers.

<sup>11</sup> One Paxton Street entrance leads to Pennsy Supply's main office, showroom, and warehouse; another Paxton Street entrance leads to a parking lot used by Pennsy Supply employees to park their private vehicles; and the third Paxton Street entrance is used by Pennsy Supply trucks making deliveries to customers.

<sup>12</sup> Paxton Street and Sycamore Street are approximately one-half mile apart at the location of Pennsy Supply's facility. Drivers, Inc. employees use the Sycamore Street entrance, which is designated for their use, to reach the parking lot behind the trailer used by Drivers, Inc. as its office. Pennsy Supply trucks can use either the Paxton Street or the Sycamore Street gates to exit or return after making deliveries, but, according to Executive Vice President Eshleman, typically use one of the Paxton Street gates.

<sup>13</sup> Eshleman testified that on one of the early days of the picketing, he saw a "Preston 151" truck which was to deliver computer paper to Pennsy Supply stop at the entrance to main office, talk to a Drivers, Inc. picketer, and then leave without completing the delivery.

the Hershey Medical Center at Bullfrog Valley Road; and the United States Postal Facility at Crooked Hill Road and Elmerton Avenue. There is nothing in the record establishing that Pennsy Supply used Drivers, Inc. drivers to make concrete deliveries to the six sites after November 13, 1990.<sup>14</sup>

Pennsy Supply continued to operate its business throughout the strike, using company employees who had truckdriving experience, and drivers and trucks from approximately 40 other companies,<sup>15</sup> to make deliveries of concrete and other construction materials to customers. Donald Eshleman testified Pennsy Supply continued to request drivers from Drivers, Inc. during the strike, but Drivers, Inc. was unable to furnish more than one to five drivers a day until the strike ended in April 1991. Eshleman said that from the inception of the strike until December 1990, the Company used only cement mixers owned by Pennsy Supply to deliver concrete.

One of Pennsy Supply's customers when the strike began was Rice & Weidman, a concrete contractor at the Hershey Foods Corporate Center construction site. Stanley Shadel, a materials technician employed by Astrotech, Inc., an independent testing laboratory hired by Hershey Foods to test concrete used in the project, saw six to eight picketers on November 9, 1990, at the Sand Beach Road entrance, which he said was the union entrance to the construction site and the entrance used by Pennsy Supply trucks. The picketers, whom he recognized as Pennsy Supply drivers, carried signs saying that their union local was on strike. Shadel said he was not expecting any deliveries of concrete by Pennsy Supply on that day, and when he told that to the picketers, they seemed to lose interest. The picketing lasted several hours. He did not observe picketing on any other day.

Leon Martz, a Pennsy Supply sales representative, saw picketing at the Sand Beach Road entrance, which he also described as the entrance Pennsy Supply, used early in the morning of November 8, 1990. He observed that the picketers were carrying signs, like those described above. He said there were no Pennsy Supply vehicles on the construction site when he arrived.

Pennsy Supply had two concrete customers at the Hershey Medical Center construction site while Local Union 776 was on strike, Reliance Drilling and H. B. Alexander. Reliance Drilling's superintendent on the job was David Schiding. Schiding testified that there was only one entrance to the job-site, and that Pennsy Supply cement mixer trucks entered through that gate. He observed picketing outside that gate on 4 to 5 days, or possibly more, in November 1990. Some of the picketers carried signs on which the words, "On Strike," appeared in big letters, with a Teamsters local's number in smaller letters at the top. He said he recognized some of the picketers, who numbered from four to five, as drivers of Pennsy Supply trucks. Schiding said he had never heard of Drivers, Inc. and at the time he thought the drivers of Pennsy Supply's cement trucks were Pennsy Supply employees.

Schiding observed that most of the time the picketers stood around or sat in their vehicles, with their signs on the

hoods of their vehicles or in the back of their pickup trucks, until a Pennsy Supply truck approached, and then they put their signs on. He thought that the signs were probably not visible from approaching vehicles until the picketers put them on. Schiding recalled one incident in which the driver of a truck from another company refused to deliver his load of precast concrete because of the presence of the picketers.

Leon Martz, the Pennsy Supply sales representative, testified that on November 12, 1990, while he was at the Hershey Medical Center construction site, "Wib" Schiding, the project superintendent for Reliance Drilling, told him there had been picketing on November 9, and gave him a flyer, or leaflet, which Schiding said he had received. Martz did not observe any picketing at the construction site on that day, but did observe picketing at the site on one occasion, the date of which he did not recall.

Although there is no agreement as to precise time and place when copies of the flyer or leaflet were distributed, the Respondent does not dispute that at some point while Local Union 776 conducted picketing, the picketers passed out copies of the leaflet supplied by Schiding. The leaflet contains the statement: "On November 7, 1990, employees of Drivers, Inc., a subsidiary of Pennsy Supply, went on strike because of unfair labor practices by the management." Elsewhere in the leaflet appears the statement:

Drivers, Inc. and Pennsy Supply are operating in a joint effort with SCAB labor, which has made Pennsy an ally to this labor dispute. We would appreciate your support in this labor dispute. Please do not support SCABBING. BOYCOTT DRIVERS, INC./PENNSY SUPPLY, ON STRIKE AGAINST DRIVERS, INC. (no other employer involved).

Another Pennsy Supply customer during the strike was Baker Concrete Co., at the Postal Service Facility construction site in Harrisburg, located on Crooked Hill Road and Elmerton Avenue. There were four entrances to the construction site off of Crooked Hill Road. On November 9, 1990, Frank Cirillo, a Pennsy Supply salesman, arrived at the site about 6:30 a.m., and as he drove up Crooked Hill Road, observed approximately 20 people standing near or seated in vehicles parked on both sides of the road. He recognized two of them as Drivers, Inc. drivers. He saw picket signs, as described above. When a Pennsy Supply cement mixer truck turned onto Crooked Hill Road from Elmerton Avenue, Cirillo was instructed by Michael Dayton, the field superintendent for Baker Concrete, to have the truck pull off on the left side of Crooked Hill Road. Dayton left, then a half hour later returned and informed Cirillo that Baker Concrete had decided to cancel the concrete pour for the day because its union employees refused to work because of the picketing.

When Cirillo visited the construction site on November 13, 1990, at 6:30 to 7 a.m., he again observed a number of vehicles parked on both sides of Crooked Hill Road, and he saw a number of people, some carrying picket signs like those described above. The first Pennsy Supply concrete mixer truck arrived about 8 a.m., but instead of turning onto Crooked Hill Road, entered the construction site through the Elmerton Avenue gate. Several minutes later, the group of picketers drove to the Elmerton Avenue gate, and began

<sup>14</sup> One concrete mixer driver who continued to work for Drivers, Inc. during the strike was Ed Dundorf. He was observed driving a Pennsy Supply concrete mixer to the Hershey Medical Center construction site early in the strike.

<sup>15</sup> Eshleman testified that the drivers from other companies did not operate Pennsy Supply-owned vehicles.

picketing there. The picketers blocked the next Pennsy Supply concrete mixer truck from turning left into the Elmerton Avenue gate, but after a short delay, allowed the truck to enter the construction site. During the delay, Cirillo observed Lowell Journegan, Baker Concrete's operations manager, speak to Dan Virtue, Local Union 776's business agent. Afterwards, Virtue appeared to talk to the picketers, who then allowed the Pennsy Supply concrete mixer to proceed into the construction site. The concrete mixer was operated by an employee of Pennsy Supply.

Donald Eshleman, Pennsy Supply's executive vice president, arrived at the Postal Service construction site on November 13, 1990, about 7:45 a.m., accompanied by the first Pennsy Supply cement mixer truck of that day. The next mixer arrived at between 8:20 a.m. and 8:45 a.m., and its access to the construction site through the Elmerton Avenue gate was blocked by union picketers until approximately 9:17 a.m. The driver of the vehicle was an employee of Pennsy Supply. The remaining deliveries scheduled by Pennsy Supply for that day were canceled.

Eshleman returned to the Postal Service construction site on November 16, 1990, accompanied by a Pennsy Supply cement mixer truck. He saw eight union picketers, at the Elmerton Road gate, but the truck was allowed to pass. Eshleman's assertion that no Drivers, Inc. drivers were used to make cement deliveries to this and five other construction sites stands uncontradicted.

Section 8(b)(4)(B) of the Act prohibits secondary picketing by a union against an employer "with whom it does not have a labor dispute, in order to force that [employer] to cease doing business with another [employer] (usually an employer with whom the union does have a dispute)."<sup>16</sup> *Mine Workers (Boich Mining Co.)*, 301 NLRB 872, 873 (1991). However, only secondary activity for the forbidden statutory objectives violates the Act. Prohibited is picketing by a union which has as its object enmeshing neutral employers in a dispute not their own. The type of conduct condemned is "union pressure calculated to induce the employees of a secondary employer to withhold their service in order to force their employer to cease dealing with the primary employer." *NLRB v. Servette, Inc.*, 377 U.S. 46, 52-53 (1964). Speaking of the purpose of Section 8(b)(4), the Board, in *Teamsters Local 560*, 248 NLRB 1212 (1980), said

<sup>16</sup>(b) It shall be an unfair labor practice for a labor organization or its agents—

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person . . . *Provided*, that nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing . . .

that "We start with the fundamental proposition that Section 8(b)(4) was designed to preserve the traditional right of striking employees to bring pressure against employers who are substantially involved in their dispute, while protecting neutral employers from being enmeshed in it."

The standards applied by the Board in determining if picketing of secondary employers is primary were set out in *Moore Dry Dock Co.*, 92 NLRB 547, 549 (1950). There the Board held that picketing was primary if it met the following conditions:

- (a) The picketing is strictly limited to times when the situs of dispute is located on the secondary employer's premises; (b) at the time of the picketing the primary employer is engaged in its normal business at the situs; (c) the picketing is limited to places reasonably close to the location of the situs; and (d) the picketing discloses clearly that the dispute is with the primary employer.

None of the picketing carried out by the Union, other than at the Sycamore Street entrance to Pennsy Supply's Paxton Street facility, qualifies as primary picketing under the Board's criteria.

Drivers, Inc. shares a portion of Pennsy Supply's Paxton Street facility as a common situs under a joint lease arrangement, but by established practice and notice before the strike began, the Sycamore Street entrance, which is the entrance nearest Drivers, Inc.'s trailer and parking lot, was the designated entrance or gate for use by Drivers, Inc. and its employees. Charles Welsh, the general manager of Drivers, Inc. since mid-1987, credibly testified that at least twice a year he had posted notices on the bulletin board at Drivers, Inc.'s trailer, informing Drivers, Inc., employees that they were to use only the Sycamore Street gate to enter and leave in their personal vehicles. He said that if he saw a Drivers, Inc. employee coming in through another gate, he reminded the driver to use only the Sycamore Street gate.

Respondent's Exhibit 11 is a copy of a letter, dated June 21, 1990, signed by Charles S. Welsh, addressed to six employees of Drivers, Inc. who were regularly leased to Robert M. Mumma, Inc., as low-bed drivers. The drivers regularly leased to Robert M. Mumma, Inc. were the last of the Drivers, Inc. employees brought under Welsh's direct supervisory control. Until the effective date of the letter, June 25, 1990, they had clocked in and out, and received their work assignments and paychecks at the Pennsy Supply dispatcher's office. In the letter, Welsh informed the six employees that effective June 25, 1990, they would "punch in and out at the Drivers, Inc. trailer." In the letter, Welsh stated that "the above employees will use the Sycamore Street entrance to enter and exit the property, the Paxton Street entrance will not be used." The letter states that failure to follow the directions given in the letter will subject the employees to disciplinary measures.

I find the evidence sufficient to show that a reserved gate system had been established and maintained before the strike began. The Respondent Union's right to picket Pennsy Supply's Paxton Street facility, therefore, was limited to that entrance. *Laborers Local 135*, 300 NLRB 920 (1990).

The Respondent Union, however, did not limit its picketing to the Sycamore Street gate reserved for Drivers, Inc.'s

use. By the next day, the Union had broadened the situs of its picketing to include the three Paxton Street entrances to the Paxton Street facility, which were used exclusively by Pennsy Supply's customers, employees, and vehicles. The Union also expanded its picketing to construction sites where Pennsy Supply had customers to which it sold and delivered concrete. Drivers, Inc. had no business relations with any of the contractors or suppliers at the construction sites; moreover, the record of this preceding clearly shows that Pennsy Supply's customers at those sites) had no knowledge of Drivers, Inc. and assumed that the drivers of Pennsy Supply's cement mixer trucks were employees of Pennsy Supply. In any event, it is clear from the record that the Union at times picketed the construction sites when Pennsy Supply trucks were not present,<sup>17</sup> and when Pennsy Supply trucks were present, but were not being driven by Drivers, Inc. drivers.<sup>18</sup>

There can be no doubt in this case about the objectives of the Union's picketing, which were clearly spelled out in the leaflet which its picketers distributed. The leaflet referred to Drivers, Inc. as a subsidiary of Pennsy Supply, and to Pennsy Supply as an ally of Drivers, Inc. and urged a boycott of Drivers, Inc. and Pennsy Supply. Clearly, the Union was attempting to enmesh Pennsy Supply and other secondary employer-customers of Pennsy Supply in the Union's dispute with Drivers, Inc., the primary employer. Despite assertions by the Union printed on its picket signs that no employer other than Drivers, Inc. was involved in the strike,<sup>19</sup> the Union's self-declared objective was much broader. The Union clearly picketed the premises of secondary employers for the purpose of inducing the employees of secondary employers to withhold their services from Pennsy Supply and to force neutral employers to cease dealing with Pennsy Supply. Picketing of neutral secondary employers for such purposes violates Section 8(b)(4)(i) and (ii)(B) of the Act.

Unless the evidence establishes that Drivers, Inc. and Pennsy Supply were a single employer, joint employers, alter egos, or allies in the strike, as claimed by the Respondent as affirmative defenses, the picketing conducted by the Union at the three Paxton Street entrances to Pennsy Supply's Paxton Street facility during November and December 1990, at the Hershey Medical Center during November 1990, at the Hershey Foods Corporate Center construction

site on November 8 and 9, 1990, and at the Postal Service construction site on November 13 and 16, 1990,<sup>20</sup> was illegal, and violated Section 8(b)(i) and (ii)(4) of the Act.

### III.

Respondent moves that an adverse inference be drawn from Pennsy Supply's refusal to disclose information which it blacked out on various casualty insurance policies which it furnished pursuant to a subpoena duces tecum served on it by the Respondent. The inference which Respondent requests be drawn against Pennsy Supply and the General Counsel is that:

Pennsy Supply provided substantial insurance coverage for Drivers, Inc., its employees, and the property that Drivers, Inc., leases from Mumma Realty Associates, at no cost to Drivers, Inc., and at significant cost to Pennsy Supply.

The insurance policies at issue are Pennsy Supply's Commercial General Liability Policy, Commercial Excess Liability Policy, and Commercial Package Policy for the years 1987 through 1991, issued by the PMA Group, which list a number of additional named insureds, one of which is Drivers, Inc.<sup>21</sup> Pursuant to a subpoena duces tecum, served by Respondent, Pennsy Supply produced a copy of the Commercial General Liability Policy, covering the period from March 3, 1988, to March 3, 1989, which was admitted in evidence as Respondent's Exhibit 26. However, before turning over the copy of the policy to the Respondent, Pennsy Supply blacked out the figures shown on the policy as "Limits of Insurance" in the part of the policy entitled "Commercial General Liability Declarations," and the figures in the columns under the headings of "PREMIUM BASIS; TERR.; RATE (PREM OPS/PRODUCTS); and, PREMIUM (PREM OPS/PRODUCTS)," in the part of the policy entitled "Commercial General Liability Supplemental Declarations." Because all of the numerical figures are blacked out on the copy of the policy in evidence, it is not possible to determine from the face of the policy what the premium was, or upon what it was based.

<sup>17</sup> The Union picketed the Hershey Foods Corporate Center construction site on November 8, 1990, when no Pennsy Supply vehicles were on the site, and again on November 9, 1990, when there were no Pennsy Supply vehicles on the site or scheduled to be on the site that day. Picketing outside the Postal Service construction site began on November 13, 1990, approximately 1-1/2 hours before the first Pennsy Supply cement mixer truck arrived about 8:20 a.m.

<sup>18</sup> Pickets blocked the path of the second Pennsy Supply mixer which arrived at the Elmerton Avenue gate on November 13, 1990, about 8:45 a.m. The record indicates that the driver of the vehicle was an employee of Pennsy Supply. There is nothing in the record discrediting Pennsy Supply's contention that Drivers, Inc. drivers were not used after November 13, 1990, to make concrete deliveries to this and five other construction sites. Thus, it may be inferred from the evidence that the Pennsy Supply mixer truck which arrived at the Elmerton Road gate on November 16, 1990, while picketing was going on, was not driven by a Drivers, Inc. driver.

<sup>19</sup> Regardless of that statement on the picket signs, employer representatives from the construction sites recognized some of the strikers as drivers of Pennsy Supply trucks, and interpreted the strike as being against Pennsy Supply.

<sup>20</sup> Respondent requests judgment in its favor as to the allegations of the complaint that picketing occurred at the Postal Service construction site on November 17, 18, and 19, 1990, because of lack of any evidence of picketing on those dates. Although there is evidence of picketing at the various construction sites on other unrecalled dates in November 1990, there is no specific evidence of picketing on those three dates; therefore, Respondent's request is granted.

<sup>21</sup> Included on the list of additional named insureds are Nine Ninety Nine, Inc. (holding company); Pennsy Supply, Inc. (operating entity); Robert M. Mumma, Inc. (wholly owned subsidiary Pennsy Supply, Inc.); Pennsylvania Supply Company; Bobali Corporation; Middle Park, Inc.; Drivers, Inc.; Elco Concrete Products, Inc.; Lebanon Rock, Inc.; Mumma Realty Assoc.; Mumma Realty Assoc. Inc.; Hummelstown Quarries, Inc.; Lisa M. Morgan; Linda M. Roth; Barbara M. McK. Mumma; Robert M. Mumma II; and Robert M. Mumma Marital Trust. The "Schedule of Hazards," upon which the premium appears to be based includes various properties owned by Pennsy Supply, Inc.; Mumma Realty Associates II; Nine Ninety Nine Inc., t/a Amity Farms; Lebanon Rock, Inc.; Mumma Realty Associates I; Bobali Corp.; Hummelstown Quarries, Inc.; Robert M. Mumma; and Elco Concrete Products, Inc.

Lisa Mumma-Morgan, general counsel and vice president of Pennsy Supply, testified that the premium for its commercial general liability insurance is based upon Pennsy Supply's gross sales, and there is no additional cost to Pennsy Supply involved in adding Drivers, Inc. as an additional named insured.

Charles J. Cavanaugh, who handles the Pennsy Supply account for PMA, testified that a commercial package policy adds property coverage to a general liability policy. The insurance policy protects the insured against sums which the insured may become legally obligated to pay as damages because of "bodily injury" or "Property damage." He said that sales and payroll are the main basis for charging premiums for general liability policies. He said PMA Group's general policy is that there is no specific charge for additional insureds on its liability policies.

After hearing considerable argument from the parties during the hearing on the issue of the blacked out figures, I ruled that the figures are relevant to the issues in this case, and I ordered Pennsy Supply to produce the figures which it had blacked out. Before requiring compliance, I offered Pennsy Supply the opportunity to request a protective order limiting disclosure to third parties of the blacked out information. I declined an offer by Pennsy Supply to examine the withheld information in camera, and the parties were unable to agree upon terms for disclosure. Pennsy Supply declined to produce the information as ordered. I found Pennsy Supply to be in violation of the disclosure order, but, as it did not appear that the information alone would be dispositive of the case, I found that an adequate remedy for Pennsy Supply's failure to comply with my order would be the drawing of an adverse inference against Pennsy Supply, and by implication, against General Counsel.

Pennsy Supply refused to disclose the blacked out figures because they show Pennsy Supply's estimated sales, and that figure is close to its actual sales. Counsel for Pennsy Supply asserts that the figures are not relevant, and because Pennsy Supply is a closely held corporation which is family owned and operated, its sales figures are proprietary information. Pennsy Supply contends that disclosure of sales information in an extremely competitive market would cause Pennsy Supply substantial harm, and the potential for harm outweighs Respondent's need for the information.

Respondent argues that the policies covered property used by Drivers, Inc. and that the premium information would show that Pennsy Supply has been providing the insurance coverage at no cost to Drivers, Inc., but at a substantial or significant cost to Pennsy Supply. Payment of insurance premiums for insurance protecting Drivers, Inc. is relevant because it shows an element of control by Pennsy Supply over Drivers, Inc.

General Counsel states that he "does not condone failures to produce relevant information required by Board subpoenas," and that where a party in control of relevant information refuses to disclose the information without sufficient justification, "an inference may be drawn that the non-disclosed information would be adverse to the non-disclosing party's interests." General Counsel argues that the most that can be inferred from Pennsy Supply's failure to disclose the blacked out figures is that whatever benefit inured to Drivers, Inc. from the insurance coverage "came at some cost, or a cost, to Pennsy Supply." Such an inference, concludes counsel for

the General Counsel, "does not support Respondent's affirmative defenses."

I have considered the posthearing briefs submitted by the parties on the issue of whether or not an adverse inference should be drawn, as requested by the Respondent. I agree with the General Counsel's position that under circumstances such as exist in this case, it is proper to infer that if disclosed, the information would be unfavorable to Pennsy Supply's position that the liability insurance coverage afforded to Drivers, Inc. as an additional named insured on Pennsy Supply's policy, was provided without cost to Pennsy Supply. *Lemay Caring Center*, 280 NLRB 60 fn. 2 (1986). I further agree with General Counsel that it would be improper to infer that the cost to Pennsy Supply was "substantial" or "significant," as opposed to unsubstantial or insignificant. Such terms are imprecise and relative. What may be substantial or significant in one context, may not be in another. Accordingly, I draw the inference that the blacked out figures, if disclosed, would be unfavorable to Pennsy Supply's position, and would support the inference that the insurance coverage provided Drivers, Inc. under Pennsy Supply's commercial general liability insurance policy was at no cost or without cost to Pennsy Supply.

#### IV.

Respondent moves that the testimony of Lisa Mumma-Morgan, who was called as a witness by the Charging Party, Pennsy Supply, be stricken because she violated the sequestration of witnesses rule in effect during the hiring.<sup>22</sup>

There is no dispute that Lisa Mumma-Morgan, general counsel and vice president of Pennsy Supply, was present in the hearing room on the first day of the hearing when the administrative law judge ordered sequestration of the witnesses, and that she remained in the hearing room for some or all of that day after all witnesses were directed to leave the hearing room. The only factual issue in dispute is whether she left the hearing room on the first day, and did not return until she was called as a witness, or she returned and remained in the hearing for part of the second day of the hearing.

Lisa Mumma-Morgan acknowledged that she remained in the hearing room after the sequestration order was granted on the first day of the hiring. She said that she left the room when Pennsy Supply's attorney raised the possibility she might be called as a witness, but did not recall if it was before or after the luncheon recess. She said that she recalled only being present while attorneys in the case argued about documents. She did not recall who, if anyone, was testifying when she left. She said she believes that Attorney Brewer, who represents Pennsy Supply, said that while he did not have any intention at the time of calling her as a witness, that largely depended on the evidence, and just to be safe, she should leave, and she did, ahead of everyone else in the Pennsy Supply group she had accompanied to the hearing.

Daniel Witmer, who testified as a witness for the Respondent, was present during the first and second days of the hearing. He was present when the sequestration order was given, and observed that Lisa Mumma-Morgan remained in

<sup>22</sup> Counsel for the General Counsel's motion to sequester witnesses was granted on the first day of the hearing, before any witness testified.

the hearing room after other potential witnesses left. He said that she did not leave until about 3:30 p.m., on the first day of the hearing, and he recalled that she was again present on the second day, and left the hearing room while Donald Eshleman was testifying.

Lisa Mumma-Morgan subsequently was called as a witness by the Charging Party on December 16, 1991, 6 months after the hearing began,<sup>23</sup> and was permitted to testify over the objection of the Respondent. Before she was allowed to testify, Respondent was afforded the opportunity to fully litigate the issue of whether or not her testimony should be suppressed because she violated the witness sequestration order. After considering the evidence adduced on this issue, I denied preliminarily the Respondent's motion.

Although not inconsequential, Lisa Mumma-Morgan's testimony was for the most part cumulative, and was not dispositive of any issue. Her testimony touched on a number of issues. She answered questions about the property lease to which Mumma Realty Associates, Pennsy Supply, and Drivers, Inc. are parties, and about her decision that rather than the two lessees splitting the \$500-per-month lease payment, Drivers, Inc. would pay \$300, and Pennsy Supply would pay \$200, and Pennsy Supply would pay utility costs rather than attempt to separate out those costs attributable to Drivers, Inc. She also testified on the commercial general liability insurance policy issue, and stated that the premium is based on gross sales. She said that her mother, she, and Donald Eshleman exercise policy decisional authority in the operation of Pennsy Supply, with her mother holding final decisional authority. She answered questions concerning the role of Pennsy Supply Vice Presidents Eshleman Lake, Rice, and Nye in the operation of Pennsy Supply. She identified the Mumma family corporations in which she is a corporate officer, and testified that her mother runs Robert M. Mumma, Inc. She stated that Nine Ninety Nine, Inc., is a Pennsylvania corporation owned by her father's estate and her family.

Rule 615 of the Federal Rules of Evidence provides for exclusion of witnesses by the trial judge at the request of a party or on his own motion. The Board has approved the policy underlying the sequestration rule. *Unga Painting Corp.*, 237 NLRB 1306, 1307 (1978). In *Gossen Co.*, 254 NLRB 339, 339 fn. 1 (1981), the Board adopted the administrative law judge's ruling refusing to exclude certain testimony because the respondent's counsel had allegedly violated a sequestration arrangement.<sup>24</sup> The administrative law judge in that case noted that the remedy for disobedience is left to the sound discretion of the judge, and that total exclusion of a witness' testimony is a harsh result. In *U.S. v. Torbert*, 496 F.2d 154, 158 (9th Cir. 1974), the court of appeals held that "it is ordinarily an abuse of discretion to disqualify a witness [because of violation of a sequestration order] unless a defendant or his counsel somehow cooperated in the violation of the order."

I find nothing of that nature in the circumstances of the admitted failure of witness Lisa Mumma-Morgan to comply with the sequestration order in this case, or in the apparent

failure of the Charging Party's attorney to anticipate at the outset of the hearing that she would be needed as a witness. Lisa Mumma-Morgan testified credibly that when she remained in the hearing room after the sequestration order was given she did not expect to be called as a witness in the case. I further credit her testimony that when the Charging Party's attorney advised her that the occasion might arise when he would need her testimony, she left the hearing room, and did not return until she was called as a witness. I do not find that witness Daniel Witmer has a clear enough recollection some 6 months later concerning who was or was not in the hearing room during the second day of the hearing to support a finding that that Lisa Mumma-Morgan was either mistaken or untruthful in her testimony.

On the record before me, I find that Lisa Mumma-Morgan's violation of the sequestration order was inadvertent and unintentional. I further find that there is nothing in the record indicating that Attorney Brewer intentionally allowed her to remain in the hearing room even though he knew at the time that he would call her as a witness, or that he purposefully or negligently failed to comply with the sequestration order by seeing to it that all of his witnesses were excluded from the hearing room.

Finally, I perceive no prejudice to the Respondent from the witness' inadvertent violation of the sequestration order during the first and, possibly, the second days of the hearing. While, as noted by Respondent, both Donald Eshleman, who testified on the first 2 days of the hearing, and Lisa Mumma Morgan testified concerning the lease between Mumma Realty Associates, Pennsy Supply, and Drivers, Inc. and gave testimony concerning the corporate structure of Pennsy Supply and other Mumma family corporations, there is little factual dispute concerning the terms and conditions of the lease or the corporate structure of the various companies. Lisa Mumma-Morgan's testimony added little that was new to the evidence in the case. In evaluating her testimony, and determining what weight, if any, to give it, I have taken into consideration that she may have had the opportunity to hear other witnesses' testimony on the same issues about which she testified.

In the absence of any showing that there was an intentional or purposeful disregard of the sequestration rule, and in the absence of any showing of prejudice to the Respondent, I do not find it appropriate to exclude the testimony of Lisa Mumma-Morgan.

## V.

Whether Pennsy Supply and Drivers, Inc. were at any relevant time a single employer, joint employers, alter egos, or allies depends on the relationship between the two employers. Considerable evidence was presented on this issue during the hearing.

(a) *Ownership and financial control.* Drivers, Inc. was one of a number of companies owned and controlled by Robert M. Mumma until he sold his interest in the Company in 1985 for \$3600 to Harry G. Lake Jr., Ronald Nye, and Ward Rice, three vice presidents of Pennsy Supply,<sup>25</sup> another com-

<sup>23</sup> Attorney Brewer stated that he made his decision to call her as a witness some 10 days earlier.

<sup>24</sup> In *Gossen Co.*, supra, the judge found there was no violation of his sequestration order because he had not issued a sequestration order. What was violated, he said, was a sequestration arrangement agreed to by the parties.

<sup>25</sup> At the time of the sale of Drivers, Inc. and at all relevant times since then, Harry G. Lake Jr. was Pennsy Supply's vice president of finance and administration, Ward Rice was its vice president of



pany owned and controlled by Robert M. Mumma. The sales agreement was oral. At the time of the sale, Drivers, Inc. had no assets, and Pennsy Supply was its only customer. Lake, Nye, and Rice do not have any ownership or other financial interest in Pennsy Supply or any other Mumma corporation; however, until they were removed in 1991, Lake, Nye, and Rice were members of the board of directors of Pennsy Supply.<sup>26</sup> Lake is still a member of the board of directors of at least one other Mumma family corporation, Robert M. Mumma, Inc. The parties stipulated that prior to the 1985 sale of Drivers, Inc. to the three vice presidents of Pennsy Supply, Drivers, Inc. and Pennsy Supply were joint employers.

Under the payment arrangement agreed to by Robert M. Mumma at the time of the sale, and continued essentially unchanged since his death in 1986 by his widow, Barbara Mumma, who succeeded him as president of Pennsy Supply, Pennsy Supply and Robert M. Mumma, Inc., reimbursed Drivers, Inc. for all of its labor costs related to providing drivers to Pennsy Supply and Robert M. Mumma, Inc., including overtime and benefits which pass through, plus 1 percent, and Pennsy Supply pays Drivers, Inc. a minimum service charge fee of \$700 per month.<sup>27</sup> Under this arrangement, Drivers, Inc.'s gross revenues in 1989 were approximately \$3 million, and its owners realized a profit of approximately \$25,000.

In 1986, Lake asked Barbara Mumma for a written contract covering services provided by Drivers, Inc. Barbara Mumma refused to give Lake a written contract for Drivers, Inc.'s services, as he requested. She told Lake that Pennsy Supply would honor the existing compensation agreement if Drivers, Inc. supplied drivers when Pennsy Supply requested them.

Barbara Mumma, whose testimony I credit, said that it was obvious that if the pay of Drivers, Inc. employees increased, the cost to Pennsy Supply of using Drivers, Inc. drivers would also increase. She said that over the years Pennsy Supply continued using Drivers, Inc. and there have been increases in the invoices from Drivers, Inc. She discussed the increased costs with her daughter, Lisa Mumma-Morgan, and Donald Eshleman, Pennsy Supply's executive vice president, after it was brought to her attention that it cost Pennsy Supply more to use Drivers, Inc. drivers than it

operations, and Ronald Nye was its vice president of aggregate and blacktop sales. Since late 1991 or early 1992, however, Lake and Nye are no longer vice presidents of Pennsy Supply. Lake was reassigned to head two Mumma subsidiaries, Elco Concrete Products and Smith Quarry, and Nye retired. They each have a one-third interest in Drivers, Inc. Lake is president of Drivers, Inc., Rice is vice president and secretary, and Nye was treasurer until he terminated his involvement in Drivers, Inc. on September 12, 1991, when he retired. General Manager Charles Welsh took over the function of signing Drivers, Inc. checks after Nye left.

<sup>26</sup> Barbara Mumma, the president and chief executive officer of Pennsy Supply and others of the Mumma family corporations, explained that Lake, Rice, and Nye were removed from the board of directors of Pennsy Supply because Barbara Mumma decided she wanted the Mumma-family businesses to be strictly Mumma family run.

<sup>27</sup> This billing arrangement applies only to Pennsy Supply and Robert M. Mumma, Inc. Other non-Mumma corporation customers are billed at an hourly rate which includes a figure for workman's compensation and unemployment insurance.

did to use Pennsy Supply drivers. When the 1991 collective-bargaining agreement between Drivers, Inc., and Local Union 776 was signed and went into effect, the additional costs were passed on by Drivers, Inc. to Pennsy Supply.

Drivers, Inc.'s general manager, Charles Welsh, submits invoices to Pennsy Supply for gross wages, FICA tax, sales tax, variable fees, Federal employment insurance, unemployment insurance, workmen's compensation insurance, and once a month, for health insurance, pension contributions, and the \$700 minimum service charge. Checks received from Pennsy Supply are deposited in Drivers, Inc.'s regular checking account. A check for the net pay amount is drawn simultaneously and deposited in Drivers, Inc.'s payroll account.

Pennsy Supply performs computer services for Drivers, Inc., including processing Drivers, Inc.'s payroll and preparing its payroll checks, and bills Drivers, Inc. for computer time by charging it a fee of \$1 per check. Pennsy Supply buys blank checks and timecards for Drivers, Inc., ostensibly because Pennsy Supply can buy them in bulk at a better unit price from its supplier, Moore Business Forms, and Drivers, Inc. reimburses Pennsy Supply for the cost of the blank checks and timecards which it uses.

Before changing the health insurance plan for Drivers, Inc.'s employees in 1990, Drivers, Inc. purchased health insurance for its employees through the Teamsters health and welfare program. Since Drivers, Inc. dropped the Teamsters health insurance program in 1990, it is reimbursed dollar for dollar by Pennsy Supply for the health benefits claims of Drivers, Inc. employees. Health benefits claims of Drivers, Inc. employees are processed by a third-party insurer, NCAS, a subsidiary of Blue Cross/Blue Shield.<sup>28</sup> Drivers, Inc. pays NCAS for the amount paid out for employees' health benefits claims, and then bills Pennsy Supply monthly for the amount it spends on its employees for health benefits.

Drivers, Inc. pays quarterly unemployment compensation premiums to the State of Pennsylvania.<sup>29</sup> It bills Pennsy Supply for the premiums as one of the benefits which it is allowed to charge to Pennsy Supply under the compensation agreement.

The cost of workmen's compensation insurance coverage for the employees of Drivers, Inc. is another employee benefit which Drivers, Inc. charges to Pennsy Supply. Pennsy

<sup>28</sup> Welsh testified that NCAS also processes Pennsy Supply employees' health insurance claims; however, he said that Drivers, Inc. has a separate arrangement with NCAS.

<sup>29</sup> Forms received by Drivers, Inc. employee Jay K. Umbrell from the Commonwealth of Pennsylvania, Department of Labor and Benefits, Bureau of Unemployment Compensation Allowances and Benefits, relating to his claim for unemployment compensation, show the name of his employer as Sulky Corporation, not Drivers, Inc. Drivers, Inc.'s unemployment compensation account with the Commonwealth of Pennsylvania was opened in 1969 under the name of Sulky Corporation, apparently a corporation owned by Robert M. Mumma. Commonwealth records indicate that the current account name is Drivers, Inc. resulting from a corporate name change. When the account was first opened in the name of Sulky Corporation, it received a partial transfer of experience (used to determine the unemployment compensation tax rate) from the experience rating record and reserve account of a predecessor business, Pennsy Supply Inc. While the corporate name change to Drivers, Inc. was recorded in the Commonwealth's records, for unknown reasons the Pennsylvania Bureau of Unemployment Compensation Benefits and Allowances still uses the name of Sulky Corporation on their forms.

Supply obtains the insurance coverage for Drivers, Inc. as an additional insured under Pennsy Supply's policy. This results in a substantial savings to Drivers, Inc. compared to the higher premiums which it would be charged if it obtained the coverage on its own. Pennsy Supply bills Drivers, Inc. for the premium expense for Drivers, Inc. employees, and Drivers, Inc. then bills Pennsy Supply for the cost of coverage for its employees who drive Pennsy Supply vehicles.

Drivers, Inc. is listed as an additional insured on Pennsy Supply's vehicle liability insurance policy, at no additional cost to Pennsy Supply. Pennsy Supply also carries a commercial general liability insurance policy, issued by the PMA Group, which lists a number of additional named insureds, one of which is Drivers, Inc.<sup>30</sup> Whether coverage of Drivers, Inc. under that policy comes at a cost to Pennsy Supply cannot be determined with certainty from the face of the policy, because before turning over the copy, which has been admitted in evidence as Respondent's Exhibit 26, to the Respondent pursuant to a Board subpoena, Pennsy Supply blacked out the limits of coverage and the premium information. An adverse inference has been drawn against Pennsy Supply that this insurance coverage is not provided to Drivers, Inc. without cost to Pennsy Supply.

(b) *Interrelation of operations.* Drivers, Inc. is the main supplier of drivers to Pennsy Supply.<sup>31</sup> When Robert M. Mumma sold Drivers, Inc. to its current owners, all of its business was with two Mumma companies, Pennsy Supply and Robert M. Mumma, Inc. Although no written sales agreement exists, the new owners of Drivers, Inc., there was an understanding among the principals that the Company would continue supplying drivers to Pennsy Supply when requested. Barbara Mumma, who assumed the presidency of Pennsy Supply after the death of her husband, Robert M. Mumma, in 1986, orally agreed to continue the existing compensation arrangement with Drivers, Inc. if Drivers, Inc. supplied drivers to Pennsy Supply and Robert M. Mumma, Inc. when they requested them.

As noted earlier, at the time of the work stoppage and strike in November 1990, Pennsy Supply directly employed approximately 40 drivers, and got most of the rest of the drivers it needed from Drivers, Inc.<sup>32</sup> During the busiest time of year in the construction industry in the Harrisburg area, Pennsy Supply uses from 70 to 75 drivers from Drivers, Inc. who regularly drive Pennsy Supply vehicles each day. Dur-

ing November and December, Pennsy Supply's need for Drivers, Inc. drivers decreases to 15 to 16 drivers daily, depending on the weather.<sup>33</sup> Drivers, Inc. drivers usually drive Pennsy Supply's concrete mixers and triaxle dumptrucks, and over-the-road haulers. When driving Pennsy Supply vehicles, Drivers, Inc. drivers sometimes wear hats or jackets with Pennsy Supply's name on them. The other vehicles operated by Pennsy Supply, which include dump trailers, haulers, and cement haulers, are driven almost exclusively by its own employee-drivers. At its Newport and Holly Springs, Pennsylvania facilities, Pennsy Supply contracts with at least two outside companies to supply additional trucks and drivers, on a daily basis, as needed. All of Pennsy Supply's vehicles are maintained by its mechanics.

On infrequent occasions, Drivers, Inc. employees performed other duties than driving trucks for Pennsy Supply. Jay K. Umbrell, a low-bed driver employed by Drivers, Inc. for 11 years, testified he has filled in for loader operators in Pennsy Supply's yard, and was paid by Drivers, Inc. for doing the work. Herb Morrow, another Drivers, Inc. driver, sometimes filled in for Pennsy Supply dispatchers.

Company President Lake testified that it was not contemplated that Pennsy Supply would have exclusive use of Drivers, Inc. drivers, and after purchasing the company in 1985, Lake and his partners sought new customers. During the first year under the new ownership, Drivers, Inc. leased drivers on a couple of occasions to a company named Highway Equipment company, and in 1990 leased drivers to Highway Equipment Company and several other non-Mumma companies, including Stewart Amos Equipment, Stevenson Equipment, and Groft Tractor. However, a substantial percentage of Drivers, Inc.'s business continued to be with Pennsy Supply and Robert M. Mumma, Inc. Lake placed the percentage of Drivers, Inc.'s business with Pennsy Supply and Robert M. Mumma, Inc. in the year after the purchase at 90 percent or close to it. Charles Welsh, the general manager of Drivers, Inc., placed the percentage of the Company's business with Pennsy Supply and Robert M. Mumma, Inc. at 98 to 99 percent over the past several years.

(c) *Management.* Following their purchase of the Company, the new owners of Drivers, Inc. turned over the day-to-day operation of Drivers, Inc. to Bruce Lovett, an employee of Pennsy Supply,<sup>34</sup> who ran Drivers, Inc. from the offices of Pennsy Supply for a period of 2 years until Charles Welsh was hired by Drivers, Inc. as its general manager and vice president in July 1987. Lovett's salary during the 2-year period was paid entirely by Pennsy Supply.<sup>35</sup> Until Welsh was hired, Lovett solicited and interviewed applicants for employment by Drivers, Inc. and made offers of employment. He had authority to issue disciplinary warnings to Drivers, Inc. employees, and assisted in handling other personnel matters involving Drivers, Inc. employees. Clerical employees of Pennsy Supply, who from time-to-time assisted Lovett in preparing correspondence for Drivers, Inc. also received no pay from Drivers, Inc. for their services. Lovett,

<sup>30</sup> Included on the list of additional named are Nine Ninety Nine, Inc. (holding company); Pennsy Supply, Inc. (operating entity); Robert M. Mumma, Inc. (wholly owned subsidiary Pennsy Supply, Inc.); Pennsylvania Supply Company; Bobali Corporation; Middle Park, Inc.; Drivers, Inc.; Elco Concrete Products, Inc.; Lebanon Rock, Inc.; Mumma Realty Assoc.; Mumma Realty Assoc. Inc.; Hummelstown Quarries, Inc.; Lisa M. Morgan; Linda M. Roth; Barbara M. McK. Mumma; Robert M. Mumma II; and Robert M. Mumma Marital Trust. The "Schedule of Hazards," on which the premium appears to be based include various properties owned by Pennsy Supply, Inc.; Mumma Realty Associates II; Nine, Ninety-Nine Inc., t/a Amity Farms; Lebanon Rock, Inc.; Mumma Realty Associates I; Bobali Corp.; Hummelstown Quarries, Inc.; Robert M. Mumma; and Elco Concrete Products, Inc.

<sup>31</sup> Harry G. Lake Jr. described Drivers, Inc. as being in the chauffeuring business.

<sup>32</sup> Pennsy Supply sets the rate of pay for the 40 drivers it employs. The rate of pay for Drivers, Inc. drivers, is set by the collective-bargaining agreement between Drivers, Inc. and Local Union 776.

<sup>33</sup> Ten dump truck drivers and five to six concrete mixer drivers.

<sup>34</sup> Lovett was a personnel assistant at Pennsy Supply.

<sup>35</sup> According to Harry G. Lake Jr., one-third owner and president of Drivers, Inc., Robert M. Mumma agreed at the time of the 1985 purchase of Drivers, Inc. by Lake and his two partners, that they could use Lovett for such services until they found a suitable replacement.

with the assistance of legal counsel, handled labor relations matters with Local Union 776 on behalf of Drivers, Inc.

Before Charles Welsh was hired as general manager of Drivers, Inc. and the Company's office was relocated from the offices of Pennsy Supply to the trailer where the Company's office is now located, employees of Drivers, Inc. who were leased to Pennsy Supply, received work assignments directly from Pennsy Supply's dispatchers, clocked in and out on timeclocks located at the Pennsy Supply dispatchers' office, and received their paychecks at the dispatchers' office. The usual procedure followed by the Pennsy Supply dispatchers was to post lists in the afternoon with the names of the Pennsy Supply drivers, and the Drivers, Inc. drivers scheduled to work the next day, and the numbers on the trucks they were to drive.<sup>36</sup> There were separate lists for Pennsy Supply drivers and Drivers, Inc. drivers, but assignments were by seniority calculated using both lists. Seniority was an important factor in assignment of trucks, because the more senior drivers drove the newer and larger trucks, and received higher pay for driving the bigger trucks. On the mornings they were scheduled to work, Drivers, Inc. drivers who drove cement mixer trucks reported to their trucks after clocking in, and then reported in by radios installed in the trucks to the dispatcher for their first delivery assignment, and, after completing that assignment, for further assignments, until they were told by the dispatcher to return and wash their trucks.

When Charles Welsh took over management of Drivers, Inc. in July 1987, the Company still did not have an office of its own, and was operating from the offices of Pennsy Supply. The company's personnel and payroll functions were handled in-house by Pennsy Supply, and the company was still managed by Bruce Lovett.

Lake told Welsh that he wanted to separate Drivers, Inc. from Pennsy Supply, and move Drivers, Inc. to a parcel of land, which Pennsy Supply and Drivers, Inc. jointly leased, located at the south end of Pennsy Supply's Paxton Street facility, near Sycamore Street. Pennsy Supply and Drivers, Inc. jointly leased the parcel of land in 1987 from the Kim Company, now called Mumma Realty Associates,<sup>37</sup> a Mumma company which owns the land used by Pennsy Supply for its Paxton Street facility.<sup>38</sup> Drivers, Inc. uses part of the land which it jointly leases with Pennsy Supply as the site for a trailer which Welsh leased for use as its office, and another part as a parking lot for the personal vehicles of Drivers, Inc. employees. The most direct access to the trailer and parking lot is through the Sycamore Street gate, which is the gate designated for use by Drivers, Inc. employees.<sup>39</sup> Pennsy Sup-

ply uses the rest of the land covered by the joint lease for its own purposes. By oral mutual agreement between the lessees, the \$500 monthly lease payment to Mumma Realty Associates is split between Drivers, Inc. which pays \$300 a month, and Pennsy Supply, which pays \$200 a month.<sup>40</sup> Water, sewage, trash, and electrical service for Drivers, Inc.'s trailer are supplied at no further charge by Pennsy Supply. Drivers, Inc. pays its own telephone bills.

The relationship between Drivers, Inc. and Pennsy Supply changed markedly after Drivers, Inc. hired Charles Welsh as general manager and moved its office to the trailer. The three owners of Drivers, Inc. establish corporate policy, but since hiring Welsh as general manager, otherwise do not take an active role in managing the Company's day-to-day operations. Welsh testified that one condition of his employment was that he would receive authority to run Drivers, Inc. without interference,<sup>41</sup> a condition to which Company President Lake agreed. Welsh's responsibilities as general manager of Drivers, Inc. include recruiting new employees; hiring and firing of employees; disciplining employees, keeping employees' time records; keeping the Company's financial records,<sup>42</sup> including payroll records and accounts receivable and payable records; handling unemployment compensation and workman's compensation matters for Drivers, Inc.<sup>43</sup> handling grievances and arbitrations and other labor relations problems involving Drivers, Inc. and its collective-bargaining agreement with Local Union 776; and, negotiating collective-bargaining agreements with Local Union 776. The wages of drivers are set by the collective-bargaining agreement, but all other wages, except his own, are set by Welsh.<sup>44</sup> When

through another gate, he orally reminded the employee to use the Sycamore Street gate.

<sup>40</sup> Drivers, Inc. is invoiced directly by Mumma Realty Associates, Inc., for \$300 each month.

<sup>41</sup> Welsh retired from civilian employment with the U.S. Air Force in 1969, after nearly 30 years of service. After retiring he worked for Robert Mumma on special projects, mostly involving workmen's compensation, for 7 months, then accepted employment by the State of Pennsylvania. For a 10-month period in approximately 1970, Welsh worked for the Pennsylvania Department of Commerce while Robert Mumma was the Secretary of Commerce. After Mumma left his position, Welsh continued working for the Pennsylvania Department of Commerce until he retired from State government in April 1969. For the next 5 to 6 years he a\*COM008\*gain worked for Robert Mumma as a consultant on workman's compensation cases. Welsh testified that he initially was not interested when Harry G. Lake Jr. approached him February 1987 about a position with Drivers, Inc., but subsequently decided he would accept the position on three conditions which Lake accepted: (1) He would receive no interference in managing Drivers, Inc. (if his services were not acceptable to the owners, he would quit); (2) his workday would be 4 hours per day; and (3) he would receive 5 to 8 weeks' vacation during fall and winter months. Welsh stated that he works from approximately 5 a.m. until 9 or 9:30 a.m., handling the assignment of drivers based on requests which he receives from the Pennsy Supply dispatchers, and working on administrative matters concerning the operation of Drivers, Inc.

<sup>42</sup> Welsh testified that Drivers, Inc. maintains its own financial books and records.

<sup>43</sup> Welsh testified that most of the time he uses attorneys provided by the Company's insurance carrier, but that on one occasion he used an outside attorney to handle a case.

<sup>44</sup> Drivers, Inc. employs two other nondriver employees, an office manager and a man who assists Welsh in office work and sometimes fills in for Welsh in the latter's absence.

<sup>36</sup> At times not all drivers received driving assignments for the next day.

<sup>37</sup> The lease was redone on June 22, 1989, after the Kim Company was taken over by Mumma Realty Associates, another Mumma corporation.

<sup>38</sup> The lease came about after Lake asked Lisa Mumma-Morgan if Drivers, Inc. could lease some property from Pennsy Supply to use as a site for an office. Lake indicated that he was considering using a trailer for the office. Lisa Mumma-Morgan and her mother, Barbara Mumma, had no objection, as long as the lease did not impede Pennsy Supply's operations, and a lease agreement was negotiated.

<sup>39</sup> Welsh testified that at least twice a year he posted notices on the bulletin board at the trailer, instructing Drivers, Inc. employees to use the Sycamore Street gate when entering and leaving in their personal vehicles. If he saw a Drivers, Inc. employee coming in

Welsh is away, his office manager acts in his place.<sup>45</sup> Since September 1991, Welsh has signed checks for Drivers, Inc.

After Drivers, Inc.'s, office was moved to the trailer in 1987, the timeclock for mixer drivers and dump truck drivers was moved to the trailer, and the driver assignment lists are posted there for Drivers, Inc. drivers.<sup>46</sup> The Drivers, Inc. drivers clock in and out, and receive their work assignments and paychecks at the trailer. The names of the Pennsy Supply drivers with driving assignments for the day are not posted at Drivers, Inc.'s, trailer.<sup>47</sup>

Drivers, Inc. low-bed drivers, who drove Robert M. Mumma, Inc. tractors and trailers which are used to move heavy equipment, continued clocking or signing in and out and receiving driving assignments at the Pennsy Supply dispatchers office until June 1990,<sup>48</sup> when they were instructed to clock in at the Drivers, Inc. trailer, and to use the Sycamore Street entrance to enter and leave and the Drivers, Inc. parking lot to park their personal vehicles. Prior to that these Drivers, Inc. employees parked their personal vehicles behind the Pennsy Supply warehouse. According to Welsh, he took that action because he did not know when they were reporting to work or leaving, and he did not feel he had control over them. From then on, the Drivers, Inc. low-bed drivers clocked in and out, and received work assignments and their paychecks at the Drivers, Inc. trailer. After the strike ended in 1991, Robert M. Mumma, Inc., did not resume leasing low-bed drivers from Drivers, Inc.

Under the procedure followed by Pennsy Supply and Drivers, Inc., at approximately 2 to 3 p.m. each day, the Pennsy Supply dump truck and concrete mixer dispatchers, or Dispatcher Supervisor William Umbrell would call Welsh by telephone and tell him how many Drivers, Inc. drivers will be needed for the next day, and the starting times, based on the number of orders to be delivered. Welsh schedules the number of Drivers, Inc. drivers needed, based on seniority, and posts a list of the names and starting times at the trailer for the drivers to see when they clocked out in the afternoon. Welsh calls those drivers who clock out before the list is posted at approximately 5 a.m. the next day to give them their assignments. About 5:45 a.m. the next day, the dispatchers tell Welsh which trucks the drivers will be using and where they will be going on their initial assignments. Welsh posts this information for the drivers to see when they clock in. Pennsy Supply's trucks are equipped with two-way radios, and the drivers receive their subsequent assignments throughout the day from the dispatchers by radio.

It is Pennsy Supply's practice to assign drivers to the same truck each day so that the drivers are familiar with the vehicle and take care of it. Pennsy Supply's executive vice president, Donald Eshleman, said generally 85 percent or more of

the time the drivers, including Drivers, Inc. drivers who drive regularly for Pennsy Supply, are assigned to the same truck each day. The remaining 15 percent of the time a particular truck might be undergoing maintenance and is not available for use, or a particular type of truck is not needed on a particular day.

Through 1989, Pennsy Supply customarily invited its own employee-drivers and Drivers, Inc. drivers who regularly drove for Pennsy Supply to a Christmas party each year. At the 1988 and 1989 parties, Pennsy Supply gave out baseball caps, with the words "Pennsy Supply" appearing on the front of the caps, to everyone who attended the parties. There was food served at the Christmas parties and door prizes were raffled off, with all who attended eligible to receive them. The entire cost of the 1988 and 1989 Christmas parties was paid by Pennsy Supply.

At Christmas time in 1989, Pennsy Supply distributed gift turkeys to its employees and to the drivers it leased from Drivers, Inc. The cost of the turkeys was paid by Pennsy Supply.

Monetary awards, the highest of which is the driver of the year award, are given out by Pennsy Supply for safety of operation, maintenance, and cleanliness of Pennsy Supply trucks. In 1988 and 1989, everyone who drove Pennsy Supply trucks were eligible for the awards, including drivers from Drivers, Inc. In 1990 and 1991, however, the policy changed, and drivers from Drivers, Inc. were not considered for the awards. Pennsy Supply's executive vice president said that there were approximately 14 such awards made at the 1989 Christmas party, and Drivers, Inc. drivers received 5 to 7 of them. In 1988, Peter E. Sheely, a dump truck driver employed by Drivers, Inc. for over 18 years, received Pennsy Supply's driver of the year award and a cash prize of \$500.

Pennsy Supply recognizes long service by employees by awarding a jacket, with Pennsy Supply's name on the back and the employee's name and length of service on the front, to employees with 20 years of service. Drivers, Inc. employees who reached 20 years of service with Drivers, Inc. also received jackets from Pennsy Supply.<sup>49</sup>

It is Pennsy Supply's policy to pay traffic fines, such as for driving an overweight vehicle or driving an oversize vehicle on an unauthorized route, imposed on drivers of its vehicles, if the driver was following instructions given to him by management or a supervisor.<sup>50</sup> If a driver is cited and fined for doing something which was his fault, he is deemed to be personally responsible for paying the fine.

One management tool relied on by Pennsy Supply to help reduce the number of vehicular accidents involving its trucks is the accident review board. The Pennsy Supply accident review board is made up of both Pennsy Supply and Drivers,

<sup>45</sup> Welsh calls the office manager daily when he is away on vacation.

<sup>46</sup> Not included in the move and change in procedure at that time were Drivers, Inc. low-bed drivers, who drove tractors and trailers owned by Robert M. Mumma, Inc.

<sup>47</sup> One driver complained to Lisa Mumma-Morgan in 1987 or 1988 that after the move to the trailer, Drivers, Inc. drivers did not receive driving assignments until after the Pennsy Supply drivers received theirs. For the rest of that winter, there was "cross-blending" of the Drivers, Inc. and Pennsy Supply lists for work assignments. The practice was not continued after that.

<sup>48</sup> The effective date was June 25, 1990.

<sup>49</sup> Three Drivers, Inc. employees observed wearing their Pennsy Supply jackets are Herb Morrow, Norman Romberger, and John Wright.

<sup>50</sup> Jay K. Umbrell, a Drivers, Inc. low-bed driver operating a Robert M. Mumma, Inc. truck received a citation under such circumstances by the Pennsylvania State Police in 1986. After Umbrell complained to Lake and Rice that Pennsy Supply's dispatcher had told him to take care of the fine, Umbrell was represented by an attorney who resolved the matter. Umbrell said he did not receive a bill from the attorney. Umbrell stated that in 1986 drivers were told to contact Donald Eshleman if they had problems with permits to move overweight loads.

Inc. employees, as well as representatives of Pennsy Supply's management. The nonvoting chairman of the board is Pennsy Supply's safety director. The accident review board reviews the circumstances surrounding vehicular accidents, involving both Pennsy Supply's own employees, and Drivers, Inc. drivers while operating Pennsy Supply vehicles, and recommends disciplinary measures, including suspension or dismissal, in cases in which it deems the drivers of the Pennsy Supply vehicle to have been at fault. If the driver was a Pennsy Supply employee, the board's recommendation goes to Pennsy Supply's executive vice president, Donald Eshleman, for action. Since Welsh took over as general manager of Drivers, Inc. in 1987, if the driver was an employee of Drivers, Inc. the board's recommendation goes to him for appropriate action. The board's recommendations are not binding on Welsh; however, it appears that in the majority of cases Welsh accepted the board's disciplinary recommendations. In several cases Welsh rejected the recommendations of the board and imposed more severe or less severe punishment or no punishment at all on Drivers, Inc. drivers found to have been at fault by the board.<sup>51</sup>

Welsh testified that no one from Pennsy Supply has disciplinary authority over Drivers, Inc. employees. Since Welsh took over control of Drivers, Inc. as general manager in July 1987, however, there have been several instances in which management personnel of Pennsy Supply attempted to assert disciplinary authority over Drivers, Inc. employees. It appears from the evidence of record that Welsh rebuffed each attempt.

One such incident involved a letter from Barbara Mumma, the president of Pennsy Supply, dated April 3, 1989, in which she stated that she agreed with the accident review board's recommendation of a 3-day suspension for a Drivers, Inc. employee named Ralph Yohn, but that a 5-day suspension, not a 3-day suspension as recommended by the board, was appropriate for Henry Gregory, another Drivers, Inc. employee. Welsh said that he had already decided to give Gregory a 5-day suspension before receiving the letter from Barbara Mumma, and Gregory had agreed to accept it. He said he did not reply to Barbara Mumma's letter or orally inform her what action he had taken.<sup>52</sup>

In August 1990, Welsh received a memorandum from Pennsy Supply's executive vice president, Donald Eshleman, barring a Drivers, Inc. employee from Pennsy Supply property because the individual had solicited Pennsy Supply employees to sign a petition for an election at Pennsy Supply. Welsh told Eshleman he could not comply with the request

because of the collective-bargaining agreement with Local Union 776, and Eshleman rescinded the memorandum.

Welsh said that on occasion, Pennsy Supply dispatchers verbally reprimanded Drivers, Inc. drivers, and Welsh told them they did not have that authority. One Pennsy Supply employee involved in such incidents was Red Umbrell, Pennsy Supply's dispatcher supervisor. Welsh said that since he talked to Umbrell, he receives reports from Umbrell when the latter has complaints about Drivers, Inc. drivers. Welsh said he thinks the practice of Pennsy Supply dispatchers reprimanding Drivers, Inc. employees stopped because he has not received further complaints from his employees.

(d) *Labor relations.* Drivers, Inc. has had collective-bargaining agreements with Teamsters Local Union 776 since the 1970s. Since he became Drivers, Inc.'s general manager in 1987, Welsh has handled all aspects of the Company's labor relations with Local Union 776, including grievances and arbitrations and negotiating collective-bargaining agreements.<sup>53</sup> The 1981 and 1984 collective-bargaining agreements were negotiated, in part, by Harry G. Lake, as representative of Robert M. Mumma, who was then the owner of Drivers, Inc. Charles Welsh, assisted by labor attorneys hired by Drivers, Inc. represented Drivers, Inc. in the 1987 and 1990 negotiations. Lake, testifying as president of Drivers, Inc. said that he and the Company's co-owners established the policy and guidelines for labor relations, and Welsh carried them out. He said Welsh was given the responsibility of negotiating the last two collective-bargaining agreements with Local Union 776, and that he consulted with Lake and the co-owners generally about bargaining and how the talks were going.

The labor attorneys for both Drivers, Inc. and Pennsy Supply are members of the Baltimore, Maryland law firm of Shawe and Rosenthal. During the 1987 collective-bargaining negotiations, the Shawe and Rosenthal attorney who represented Drivers, Inc. and advised Charles Welsh, was Arthur M. Brewer, Esq., who now represents Pennsy Supply, the Charging Party in this case. The Shawe and Rosenthal attorney who represented Drivers, Inc. and advised Charles Welsh during the 1990-1991 collective-bargaining negotiations was Steve Shawe, Esq. The decision to change individual attorneys, but not the law firm, was made by Harry G. Lake Jr., the president of Drivers, Inc. The law firm bills the two companies separately for legal fees.

Barbara Mumma, president and chief executive officer of Pennsy Supply, testified since she has been president of Pennsy Supply, its labor attorneys have been Steve and Earle Shawe, of the firm of Shawe and Rosenthal. She said she was probably aware that in 1990 and 1991 Steve Shawe was handling collective bargaining for Drivers, Inc. She said she did not think he was handling cases for Pennsy Supply at the same time. She acknowledged that she probably had conversations with Steve Shawe in 1990 and 1991 during which she asked how the Drivers, Inc. negotiations were going, but she said she did not recall his answers.

Welsh said that he left most of the actual negotiations leading to the agreement which was signed in September

<sup>51</sup> Welsh testified that he follows the recommendations of the accident review board approximately 85 percent of the time. One case in which did not follow the board's recommendation involved Drivers, Inc. employee Henry Gregory and an accident in which he was involved on March 29, 1989. The accident review board recommended a 3-day suspension. Welsh said he thought the punishment was too light, and increased the suspension to 5 days. He testified that there were two cases, those of Davis and Lassiter, in which the board recommended suspensions, but he disagreed and imposed no suspensions. In another case, he changed the board finding that an accident was chargeable against the Drivers, Inc. driver to a finding that it was not chargeable.

<sup>52</sup> Welsh also wrote a letter to Barbara Mumma inquiring if Drivers, Inc. employees could get employee discounts at Pennsy Supply's retail store. Barbara Mumma replied that Drivers, Inc. employees would receive the discount.

<sup>53</sup> Daniel Witmer, who was hired by Drivers, Inc. in 1987, was the union steward until the 1990 strike. He testified that when he received complaints from employees, he brought them to Charles Welsh. He said he had a good relationship with Welsh, and many complaints were resolved without filing a grievance.

1987 to Attorney Brewer, because he was new in the job of general manager. But Welsh said, although most of the actual negotiating was carried out by the attorney, he had the final approval authority for Drivers, Inc. When the 1987 collective-bargaining agreement expired in 1990, Welsh received full authority from the Company's owners to negotiate and sign a new contract, which, in fact, he signed for Drivers, Inc. on April 14, 1991. Although Welsh did not receive specific instructions from Company President Lake concerning the Company's bargaining positions, they had conversations concerning what the Company's position on various issues would be, and Lake expressed the view to Welsh that the contract should be in line with the inflation figure. Welsh recommended, and Lake agreed, that one company position should be that Drivers, Inc. would become self-funded for health insurance, rather than continue participation in the Teamsters health program.

While collective-bargaining negotiations were taking place between August and November 1990, Welsh met with Company President Lake or spoke to him after each negotiating session to report on how the negotiations were progressing. He acknowledged that he set up two meetings which were attended by Donald Eshleman, Barbara Mumma, Lisa Mumma Morgan, and Harry G. Lake Jr., during which Attorney Steve Shawe and he discussed the status of the negotiations. Welsh explained that it was good business to keep his biggest customer aware of what was happening, because it was likely that the new agreement would increase Pennsy Supply's costs to use Drivers, Inc. drivers. He said that he had no further meetings with the group after the employees of Drivers, Inc. began the work stoppage in November 1990, but that he continued briefing Lake two or three times a week on the labor dispute, and from time to time Eshleman asked him if he had any drivers who would cross the picket lines and come to work. Welsh also said that he did not discuss the Union's December 1990 offer to come back to work with anyone other than Attorney Shawe because the Union wanted an extension of the old contract and he was not willing to give it. He acknowledged that Attorney Shawe may have told Eshleman or Lake about the offer. Lake testified that he recalled something about an offer by Local Union 776 to return to work, but could not recall the details. Welsh said a contract was reached in April 1991 when the Union accepted the Company's offer.

Donald Eshleman testified that he had four or five conversations with Welsh about contract negotiations prior to November 7, 1990. He said that he knew the existing contract had expired on August 31, 1990, and that Welsh was conducting negotiations with Local 776 over a new agreement. Eshleman said he was concerned whether Drivers, Inc. would continue to be able to supply the drivers needed by Pennsy Supply, so he occasionally requested briefings on the progress of negotiations from Welsh. Welsh told him that lack of agreement on wages and health and pension benefits was holding up a new contract. Eshleman denied that he gave Welsh any directions or instructions concerning negotiations with the Teamsters.

Eshleman had no warning that there was going to be a strike, but he was aware that the Drivers, Inc. drivers were working without a contract, and because of that he developed a contingency plan so that if anything occurred Pennsy Supply could continue to service its customers. The plan which

he developed was based on a 1987 contingency plan given to him by Harry G. Lake Jr. in August 1990. Eshleman knew that Lake was president and one of the owners of Drivers, Inc., as well as a vice president of Pennsy Supply. After the strike started, Lake was one of Eshleman's strike team members. Eshleman stated that he and Vice President of Operations Ward Rice looked at the qualifications of Pennsy Supply quarry employees to find qualified drivers to drive cement mixers.<sup>54</sup> He said that he did not talk to Lake or Ronald Nye, who were also vice presidents of Pennsy Supply about finding qualified drivers because no one in their areas of responsibility would be qualified to drive.

Lake stated that after the work stoppage began he had conversations with Donald Eshleman and Welsh concerning how the work stoppage affected Pennsy Supply. One subject which Lake said he discussed with Eshleman was problems for Pennsy Supply created by the presence of pickets trying to stop Pennsy Supply's trucks from leaving and entering the Paxton Street facility.

Welsh was authorized to sign the 1991 agreement by a resolution passed by the board of directors of Drivers, Inc. on December 10, 1990. While he said he did not submit the agreement to the board of directors of Drivers, Inc. before signing it, he said that he told Company President Lake that an agreement had been reached, and they discussed the terms and conditions contained in the contract which he proposed to sign.

## VI.

I have set out in some detail in section V of this opinion the evidence which supports my findings on the issues of whether Pennsy Supply and Drivers, Inc. are joint employers, single employers, or alter egos, and whether Pennsy Supply performed struck work and should be deemed to be an ally of Drivers, Inc. and to have waived its neutrality. Following is a summary of that evidence as it relates to the specific issues.

(a) *Joint Employer*. The standard for determining whether two or more employers are "joint employers" is well established: "Where two or more employers exert significant control over the same employees—where from the evidence it can be shown that they share or co-determine those matters governing essential terms and conditions of employment—they constitute 'joint employers' within the meaning of the NLRA." *NLRB v. Browning-Ferris Industries*, 691 F.2d 1117, 1124 (3d Cir. 1982); *Ryder System*, 280 NLRB 1024 (1986). "No finding of a lack of arm's length transaction or unity of control or ownership is required, as in 'single employer' cases." *NLRB v. Browning-Ferris Industries*, supra, 691 F.2d at 1122. As stated by the Board, "to establish such status there must be a showing that the employer meaningfully affects matters relating to the employment relationship such as hiring, firing, discipline, supervision, and direction. *TLI Inc.*, 271 NLRB 798 (1983); *Chesapeake Foods*, 287 NLRB 405, 407 (1987).

<sup>54</sup> Eshleman said that several drivers from Drivers, Inc. applied for jobs with Pennsy Supply during the strike. Six drivers with prior experience with Drivers, Inc. were hired by Pennsy Supply. They went through the same 90-day trial period which all new employees of Pennsy Supply undergo, and they did not receive credit for their time with Drivers, Inc. for seniority purposes.

Evidence of minimal and routine supervision of employees, limited dispute resolution authority, and the routine nature of work assignments has been held insufficient to establish a "joint employer" relationship. *Laerco Transportation*, 269 NLRB 324, 326 (1984), in which the Board found "the evidence to be insufficient to establish that Respondent shared or codetermined those matters governing the essential terms and conditions of employment of the drivers at issue," the Board adopted the judge's finding that the respondent was not a joint employer of the employees. *U.S. Steel Corp.*, 270 NLRB 1318 (1984).

On the other hand, evidence of substantial control over hiring, promotion, and the base wage rates, hours, and working conditions of employees, coupled with evidence of close and substantial supervision of employees, and constant presence of supervisors with a detailed awareness and control of employees' daily activities, has been held by the Board to be sufficient to establish a "joint employer" relationship. *Quantum Resources Corp.*, 305 NLRB 759 (1991). The Board found a "joint employer" relationship in another recent case, *Continental Winding Co.*, 305 NLRB 122, 123 (1991), where even though one employer alone hired employees supplied to another and set and paid their wages, the record supported the judge's findings that the other employer to which the employees were supplied exercised sole authority to assign, schedule, and supervise the workplace conditions, and the performance of work by the employees. There, the Board said, the supervision was more than "routine" and was not "insignificant."

The parties stipulated that until Robert M. Mumma sold his interest in Drivers, Inc. in 1985, Pennsy Supply and Drivers, Inc. were joint employers. The evidence clearly establishes, however, that except for a change in ownership of Drivers, Inc., the relationship between Drivers, Inc. and Pennsy Supply after the sale continued as before until Drivers, Inc. hired Charles Welsh as its general manager in July 1987, and moved its office out of Pennsy Supply's office to the trailer where its office is now located.

During the interim period of time between the sale in 1985 and the move to the trailer and hiring of Charles Welsh in 1987, Bruce Lovett, an employee of Pennsy Supply, acting with the approval of Pennsy Supply Owner Robert M. Mumma and the new owners of Drivers, Inc. managed Drivers, Inc.'s day-to-day operations from the offices of Pennsy Supply and exercised the power to hire and fire employees, discipline employees, and conducted its labor relations with Local Union 776. Lovett's salary was paid entirely by Pennsy Supply, as were the salaries of Pennsy Supply office clerical employees who from time to time performed clerical work for Drivers, Inc.

Further, Drivers, Inc.'s employees were completely integrated into Pennsy Supply's operations. Drivers, Inc. drivers and Pennsy Supply drivers had common supervision, and were merged for seniority purposes in the assignment of work. Drivers, Inc. drivers were scheduled for work and received work assignments from Pennsy Supply's dispatchers. The Drivers, Inc. drivers clocked in and out at the Pennsy Supply dispatchers office, and received their paychecks there. Pennsy Supply kept time and attendance records for Drivers, Inc. employees, and prepared their paychecks. Only the pay scales differed. Pay rates for Drivers, Inc. employees were established by the collective-bargaining agreement with

Teamsters Local Union 776, while Pennsy Supply employees were not covered by a collective-bargaining agreement.

The evidence is sufficient to establish that Pennsy Supply and Drivers, Inc. continued to be joint employers of the drivers whom Drivers, Inc. leased to Pennsy Supply from the 1985 sale until July 1987, when Drivers, Inc. hired Charles Welsh as its general manager and moved its office to a separate location. There was a change in legal ownership, but Pennsy Supply continued to control "those matters governing the essential terms and conditions of employment" of Drivers, Inc. employees, including hiring, firing, discipline, supervision, and direction.

Since Charles Welsh assumed the position of general manager, Drivers, Inc. has had its own office and maintains its own financial records and bank accounts, and distributes paychecks drawn on its bank account to its employees for work while they are leased to Pennsy Supply.<sup>55</sup> Welsh keeps time and attendance records for its employees leased to Pennsy Supply, and those records are used to determine the pay and benefits to which the employees are entitled under the wage and benefits rates set out in Drivers, Inc.'s collective-bargaining agreement with Teamsters Local Union 776. Drivers, Inc. deducts withholding taxes, FICA taxes, and other appropriate state and Federal taxes, from the employees' gross pay, and pays unemployment compensation and workmen's compensation premiums for its employees. Drivers, Inc. also makes pension contributions and health benefits payments, and other benefits payments for its employees, as required under its collective-bargaining agreement with Teamsters Local Union 776.

Drivers, Inc. is compensated for leasing its drivers to Pennsy Supply under the oral arrangement, which provides that Pennsy Supply will reimburse Drivers, Inc. for all of its labor costs related to the drivers leased to Pennsy Supply, including overtime and benefits which pass through, plus 1 percent, and, in addition, Pennsy Supply will pay Drivers, Inc. a \$700-per-month minimum service fee.

Charles Welsh controls the hiring, firing, and discipline of Drivers, Inc. employees, including those leased to Pennsy Supply. On those occasions when Pennsy Supply employees or officials attempted to exercise disciplinary control over particular Drivers, Inc. employees, Welsh successfully rebuffed the attempts. Drivers, Inc. employees participate on Pennsy Supply's accident review board, which investigates vehicular accidents involving Pennsy Supply trucks, regardless of whether the person driving the vehicle at the time was a Pennsy Supply or Drivers, Inc. employee. However, the findings of fault and disciplinary measures recommended by the accident review board are not binding upon Welsh and Drivers, Inc. Welsh makes the determination whether to discipline Drivers, Inc. employees for accidents in which they are involved while leased to Pennsy Supply and driving Pennsy Supply trucks. In approximately 15 percent of the incidents referred by the accident review board, Welsh conducted his own investigation of an accident, and at times has rejected the findings and recommendations of the Board, and

<sup>55</sup> Drivers, Inc. pays Pennsy Supply for computer time and blank checks, and Pennsy Supply processes Drivers, Inc.'s payroll and prints the paychecks. Pennsy Supply's fee for this service is \$1 per check. There is nothing in the record to indicate that the fee is not a fair market charge for the service.

reversed the Board's finding of fault or imposed a more or less severe disciplinary measure, or none at all.

Since he assumed the position of general manager in July 1987, Welsh has controlled labor relations between Drivers, Inc. and Teamsters Local Union 776. The board of directors of Drivers, Inc. establishes labor policy for the Company, and Welsh carries the policy out. With the assistance of counsel hired and paid for by Drivers, Inc., Welsh negotiated both the 1987 and 1991 collective-bargaining agreements, which determine the terms and conditions of employment, rates of pay, and benefits of Drivers, Inc. employees, including those who are leased to Pennsy Supply. While he has kept Pennsy Supply's owners and officers informed concerning negotiations with Teamsters Local Union 776, no one from Pennsy Supply has exercised any control over the positions taken by Welsh in negotiations concerning the terms and conditions of employment of Drivers, Inc. employees who are members of the bargaining unit, or in his handling of grievances and arbitrations arising under the collective-bargaining agreements. Pennsy Supply does not exercise control over Drivers, Inc.'s labor relations to any extent that would support a finding that it is a joint employer.

Welsh, not Pennsy Supply's dispatchers, schedules Drivers, Inc. drivers for work driving Pennsy Supply trucks. The Pennsy Supply dispatchers communicate requests to Welsh each afternoon for numbers and types of drivers (e.g., concrete mixer or dump truck drivers, or drivers of other kinds of trucks), and specify the time they will be needed the next day. Welsh determines which Drivers, Inc. drivers will be sent to drive Pennsy Supply trucks, based on seniority, and notifies the drivers when to report and which Pennsy Supply truck they will be driving, based on information he receives from the Pennsy Supply dispatchers after he gives them the names of the Drivers, Inc. drivers he will be sending.<sup>56</sup> Pennsy Supply does not have the right to select or reject the drivers sent by Welsh. There is nothing in the record indicating that Pennsy Supply must approve of drivers sent by Drivers, Inc. before they will be allowed to drive Pennsy Supply vehicles. The limited control exercised by Pennsy Supply in designating how many and what kind of drivers it needs from Drivers, Inc. on a day-to-day basis is a determination which only it can make, based on its own business. That limited control does not constitute sufficient control to support a joint-employer finding.

The drivers of Pennsy Supply's trucks do not wear a uniform. Some Drivers, Inc. drivers on occasion wear hats with Pennsy Supply's name on the front while driving Pennsy Supply trucks. On occasion some of them wear hats with Drivers, Inc.'s name on the front. Drivers, Inc. drivers who have received Pennsy Supply 20-year service awards of jackets, with Pennsy Supply's name on the back, on occasion wear the jackets while driving Pennsy Supply trucks. Generally, however, it is impossible to tell which of the two companies the driver of a Pennsy Supply truck works for without knowing the driver personally.

<sup>56</sup> Pennsy Supply makes it a practice to assign the same truck to a driver each day, regardless of whether the driver is an employee of Pennsy Supply or is leased from Drivers, Inc. Its purpose is one of promoting increased driver accountability for cleanliness and daily maintenance purposes. I do not find this apparently sound good business practice to amount to control of an essential term and condition of employment.

Drivers, Inc. drivers clock in at the Drivers, Inc. trailer and report to their assigned vehicles parked in Pennsy Supply's Paxton Street facility. When they are ready for their first delivery assignments, the drivers report in to the Pennsy Supply dispatcher over the two-way radio installed in Pennsy Supply's trucks, and the dispatchers assign the drivers their initial load and destination. After the drivers deliver their first loads of the day, they report in to the dispatcher by the two-way radios, and receive new assignments. The drivers return to Pennsy Supply's facility for the day when they are notified by the dispatcher that there will be no further assignments, and, after cleaning and parking their trucks, go back to the Drivers, Inc. trailer, and clock out.

The supervision and direction exercised by Pennsy Supply over Drivers, Inc. drivers while they are on the job driving Pennsy Supply trucks is limited and routine. It is insufficient to affect the terms and conditions of their employment to such a degree that Pennsy Supply may be considered a joint employer. The supervision exercised by Pennsy Supply basically involves assigning drivers' loads and destinations. In some instances, involving overweight or oversize loads which require permits, the drivers are required to follow specified routes to their destinations. The drivers are instructed to contact Pennsy Supply's executive vice president, Donald Eshleman, if they have problems with permits.

The drivers are responsible for driving violations involving the size or weights of their loads, unless the violation resulted from their compliance with instructions given by Pennsy Supply supervisory personnel. In cases in which the violation was the result of the driver following instructions from Pennsy Supply supervisory personnel, Pennsy Supply has paid for the drivers' legal expenses and for any fines assessed against them.

Pennsy Supply's dispatchers and supervisory personnel do not have authority to discipline Drivers, Inc. employees. When complaints concerning the actions of Drivers, Inc. employees arise, they are referred to Charles Welsh, who determines whether disciplinary action is appropriate. Nothing in these actions is sufficient to give Pennsy Supply the power to determine the essential terms and conditions of employment of Drivers, Inc. employees.

The totality of the evidence establishes that after Charles Welsh was hired as the general manager of Drivers, Inc. in July 1987, the relationship between it and Pennsy Supply underwent a fundamental change. Welsh was hired, at least in part, for the purpose of separating the two companies. By November 1991, he had largely achieved that goal. Pennsy Supply no longer exercises control over the hiring, firing, and discipline of Drivers, Inc. employees leased to it, and while it exercises some supervision and direction on a day-to-day basis over leased drivers from Drivers, Inc., it is limited and routine supervision, and in the absence of hiring, firing, and disciplinary authority does not constitute sufficient control to support a joint-employer finding.

The factual situation here differs sharply from that in *W. W. Grainger, Inc.*, 286 NLRB 94, 95-96 (1987), a case also involving leased drivers in which the Board found that one company which leased its driver-employees to another company which used the drivers were joint employers. In that case, unlike the instant case, *W. W. Grainger, Inc.*, which leased drivers from Rentar Driver Services, Inc., exercised complete and exclusive control over the daily activities



of the drivers it leased from Rentar, and beyond that, effectively recommended discipline, evaluated work performance, determined vacation time, retained the right to refuse to employ any driver referred by Rentar, and exercised indirect control over the drivers' compensation. In the instant case, Pennsy Supply exercises no authority of this or a similar nature over the essential terms and conditions of employment of Drivers, Inc. employees.

On this evidence, I find that Pennsy Supply was not a joint employer of Drivers, Inc. employees it leases to drive its trucks at the time that Respondent allegedly violated the Act from on or about November 8, 1990. The evidence here does not show, as is required for joint employer status, that Pennsy Supply shared or codetermined those matter governing essential conditions of employment of Drivers, Inc. employees. Neither does the evidence show that Pennsy Supply meaningfully affected matters relating to the hiring, firing, discipline, supervision, and direction of Drivers, Inc. employees who were leased to Pennsy Supply. Without such a showing, Pennsy Supply cannot be found to have "shared or co-determined those matter governing essential terms and conditions of employment" of the Drivers, Inc. employees it leased to a sufficient extent to support a joint employer finding.

(b) *Single Employer and Alter Ego*. Joint employers and single employers are distinctly different concepts. "A single employer relationship exists where two nominally separate entities are actually part of a single integrated enterprise so that, for all purposes, there is in fact only a 'single employer.'" *NLRB v. Browning-Ferris Industries*, 691 F.2d at 1122. In that case, the court of appeals went on to say that single employer status is characterized by "an absence of an arm's length relationship found among unintegrated companies." 691 F.2d at 1122.

Joint-employer status, by contrast, does not depend on the four factor standard,<sup>57</sup> rather a finding that companies are "joint employers" assumes two or more "independent legal entities that have historically chose to handle jointly . . . important aspects of their employer-employee relationship." *NLRB v. Browning-Ferris Industries*, 291 F.2d at 1122.

In the recent case of *Gartner-Harf Co.*, 308 NLRB 531, 532 (1992), the Board listed the criteria for determining whether two employers are a single employer for purposes of the Act:

A determination of whether two or more employers constitute a single employer depends upon the analysis of four criteria: (1) interrelation of operations; (2) common management; (3) centralized control of labor relations; and (4) common ownership or financial control. Of these criteria, the Board has stressed the first three are "more critical than common ownership" and has placed "particular emphasis on whether control of labor relations is centralized." [*Hydrolines Inc.*, 305 NLRB 416, 417 (1991).]

Applying these criteria to this case, I find that Pennsy Supply and Drivers, Inc. are not a single employer for purposes of the Act. I further find, in line with *Gartner-Harf*

*Co.*, supra at fn. 2, that since they are not a single employer, a fortiori they are not alter egos, because alter egos also meet the definition of a single employer.<sup>58</sup>

(1) The relationship between Pennsy Supply and Drivers, Inc. may aptly be described as symbiotic, but the symbiosis does not extend so far that they merge into a single-integrated enterprise. No doubt the relationship is advantageous to both companies, or it would not exist, and it is probably necessary to Drivers, Inc.'s survival, but not to that of Pennsy Supply.

Through Pennsy Supply, Drivers, Inc. obtains insurance coverage which it needs in its business, in some instances at no cost, such as vehicle liability insurance as an additional insured on Pennsy Supply's policy, or at a lower rate than it would otherwise have to pay, as in the case of workmen's compensation coverage which it obtains as an additional insured under Pennsy Supply's policy,<sup>59</sup> or at some cost to Pennsy Supply, as is presumed to be the case for commercial general liability insurance, which Pennsy Supply obtains for Drivers, Inc. as an additional insured under its policy. Further, Drivers, Inc. is able to purchase certain supplies, such as blank checks and timecards, through Pennsy Supply's supplier, and is able to take advantage of the volume discount Pennsy Supply receives.

Another economic advantage realized by Drivers, Inc. from its relationship with Pennsy Supply flows from its joint lease arrangement with Pennsy Supply for a parcel of land within the Paxton Street facility that it uses for its office-trailer site and employee parking lot. Drivers, Inc. pays a rental of \$300 per month to the lessor for the land, compared to \$200 per month paid by Pennsy Supply, but for that extra \$50 per month (split into equal shares the rental amount would be \$250 per month, each), Drivers, Inc. receives all utilities for its trailer, except telephone service, from Pennsy Supply at no charge. Although no dollar amount for the value of the utility services furnished through Pennsy Supply can be found in the record, it would appear to be a bit of an understatement to say that the four services, electricity, water, sewage, and trash collection, could be obtained by Drivers, Inc. independently for no more than \$50 per month.

The benefits that Drivers, Inc. receives through its relationship with Pennsy Supply, even if the benefits are provided at some cost to Pennsy Supply, do not necessarily show an "absence of an arm's length relationship" necessary for a determination that they are single employers. All these benefits represent costs of doing business which Drivers, Inc. would otherwise have to pay. Drivers, Inc. in turn must recoup its costs of doing business from its customers in order to be profitable and stay in business. Since Pennsy Supply is Drivers, Inc.'s principal customer, these costs would have to be passed on to Pennsy Supply, directly or indirectly, in

<sup>58</sup> The Board took note of the General Counsel's argument that while all single employers are not alter egos, by definition all alter egos meet the criteria for single employer status.

<sup>59</sup> Drivers, Inc. would have to pay a higher premium for workmen's compensation insurance if it obtained the coverage on its own. Obtaining the coverage as an additional insured on Pennsy Supply's policy not only results in lower premiums to Drivers, Inc., but also represents a savings to Pennsy Supply, since Drivers, Inc. bills Pennsy Supply for workmen's compensation coverage for the drivers it leases to Pennsy Supply. Put another way, Pennsy Supply saves itself money by obtaining less expensive coverage for Drivers, Inc.

<sup>57</sup> (1) Functional integration of operations; (2) centralized control of labor relations; (3) common management; and (4) common ownership.

whole or in substantial part, if Pennsy Supply expects that Drivers, Inc. will remain in business and be in a position to supply the extra truckdrivers it needs to deliver its products.

The advantages to Pennsy Supply flowing from its relationship with Drivers, Inc. are not clearly delineated in the record, but it is a reasonable inference that since Pennsy Supply chooses to continue the relationship, rather than terminate it, as is its unilateral right, it, too, must find the relationship to be to its economic advantage. Several things supporting this conclusion are evident. First, at least until the November 1990 strike by Teamsters Local Union 776 against Drivers, Inc. that company has been a steady, dependable supplier of leased drivers when Pennsy Supply needed them. Second, there is evidence that Pennsy Supply's need for more drivers fluctuates with the season of the year and the number of orders it has to fill on any particular day. It makes economic sense that it is less costly for Pennsy Supply to lease only the exact number of extra drivers it needs on any given day, rather than to employ a sufficient number of full-time drivers to meet its needs on the busiest days, but leaving it with more drivers than it needs to accomplish the available work on slow days and in slow seasons.

Drivers, Inc.'s only business is leasing truckdrivers to other businesses. It has no assets, other than the intangible asset represented by having experienced truckdrivers available for leasing. If it has no customers to which to lease its drivers, it will not be able to retain its drivers for long, because they are paid only when they work. Without truckdrivers ready to be leased, it has no service which it can sell.

While the owners of Drivers, Inc., after purchasing the company in 1985, may have intended to expand its business by attracting new customers to supplement its business with Pennsy Supply, their efforts appear to have been largely unsuccessful. There was testimony that in recent years, before the November 1990 strike, 98 to 99 percent of Drivers, Inc.'s business continued to be with Pennsy Supply.

It is evident, therefore, that if Drivers, Inc. loses Pennsy Supply as a customer it will almost literally have no market for its service, and without such a market it will not be able to survive as a viable commercial enterprise. In short, Drivers, Inc. is virtually totally dependent upon Pennsy Supply for business, and if Pennsy Supply does not continue leasing truckdrivers from it, Drivers, Inc. will quickly go out of business.

Pennsy Supply, by contrast, is a large, successful enterprise which offers a variety of building materials and products, and other services, for sale to the construction industry in the Harrisburg-Hershey, Pennsylvania area.<sup>60</sup> Delivery of the products which it sells is incidental to its main business purpose, although no doubt it is important to its ability to attract customers for its products that it have the capability to offer delivery. It does not, however, employ a sufficient number of truckdrivers to meet its delivery needs every day. Instead, it employs only some of the truckdrivers it needs, and meets its fluctuating need for more drivers by leasing them. While the principal source from which Pennsy Supply leases drivers has been for a number of years Drivers, Inc.

it also leases trucks with drivers from other sources on occasion.

But, while Drivers, Inc. is the principal supplier of extra drivers needed by Pennsy Supply, it has no contract with Pennsy Supply binding Pennsy Supply to lease truckdrivers from it. The only arrangement that exists between the two companies is an informal understanding that as long as Drivers, Inc. has drivers available for lease, Pennsy Supply may, but is not required to, lease drivers when it determines that it needs them. In the absence of a contract binding Pennsy Supply to obtain the leased drivers it needs from Drivers, Inc. Pennsy Supply may terminate its relationship with Drivers, Inc. at will and without notice. It is a reasonable conclusion that over the years since the sale of Drivers, Inc. to its present owners in 1985, Pennsy Supply has found it to be to its economic advantage to lease drivers from Drivers, Inc. rather than lease them from some other source or hire the total number it needs as its own employees. But, the fact remains that these are alternatives to leasing truckdrivers from Drivers, Inc. which are open to Pennsy Supply, should it choose to use them.

The November 1990 strike by Teamsters Local Union 776 against Drivers, Inc. with only minor exceptions, cut off Pennsy Supply from leasing extra truckdrivers from Drivers, Inc. Pennsy Supply, however, was able to continue operating its business without Drivers, Inc. by hiring some additional drivers, diverting other employees with truckdriving experience to driving duties, and leasing trucks with drivers from other sources. The contrast demonstrated here is that Pennsy Supply can continue in business without Drivers, Inc. but Drivers, Inc. cannot continue in business without Pennsy Supply.

The evidence clearly shows that the relationship between Pennsy Supply and Drivers, Inc. is not one of equals. Indisputably, the dominant partner in the relationship, by far, is Pennsy Supply. Because of its dominance, it is simply unnecessary as a cost control measure for Pennsy Supply to burden itself with the myriad of details which would be involved in exercising any actual control over the operations of Drivers, Inc. Instead, and much simpler for Pennsy Supply, it can rely on market forces to hold down Drivers, Inc.'s costs. Since Pennsy Supply is not contractually bound to continue using Drivers, Inc. as a source for leased truckdrivers, its continued use of leased truckdrivers from Drivers, Inc. is contingent on it being cheaper to use Drivers, Inc. than it would be to use any of the other alternatives available to it. This knowledge cannot have been lost on the owners of Drivers, Inc., and its general manager, Charles Welsh. As the vice president of finance and administration for Pennsy Supply during the times relevant to this case, Harry G. Lake Jr., who also is the owner of the company most involved in its operation, has been in a position to project how much it would cost Pennsy Supply to obtain the extra truckdrivers it needs from some source other than Drivers, Inc. and this knowledge amounts to a powerful incentive to hold down Drivers, Inc.'s costs, or risk losing its business with Pennsy Supply.

(2) Applying the Board's four criteria to the relationship between Pennsy Supply and Drivers, Inc., I find that they are not parts of a single-integrated enterprise, which is necessary to a determination that they are, in fact, a single employer. Beginning with the factor on which the Board places "par-

<sup>60</sup> The exact geographical limits of the area serviced by Pennsy Supply is not established in the record. Further, Pennsy Supply is only one of a number of different business enterprises wholly owned by Nine, Ninety-Nine, Inc., which, in turn, is owned and operated by the Mumma family.

ticular emphasis," centralized control of labor relations, I find that Pennsy Supply does not control Drivers, Inc.'s labor relations, and thus there is no centralized control of labor relations.

The record shows that Charles Welsh, the general manager of Drivers, Inc. since 1987, manages all aspects of the Company's labor relations with Teamsters Local Union 776, with-in policy guidelines established by the Company's owners, and without any oversight by Pennsy Supply officials. Welsh, with the assistance of counsel retained by Drivers, Inc. operating under broad policy guidelines given to him by the Company's owners, negotiated and signed the 1987 and 1991 collective-bargaining agreements between Drivers, Inc. and Teamsters Local Union 776. There is no evidence that Pennsy Supply has been involved in any way in the handling of grievances or complaints arising under the collective-bargaining agreements since Charles Welsh took over as general manager of Drivers, Inc. in 1987, and there is no evidence that Pennsy Supply established or controlled Drivers, Inc.'s labor policy.

While Welsh appears to have kept Pennsy Supply officials, as well as the owners of Drivers, Inc., advised of the progress of negotiations, particularly during the negotiations preceding the November 1990 strike, there is no reliable evidence that Pennsy Supply played any role in the determination of terms and conditions of employment of Drivers, Inc. employees. I do not find that the periodic briefings given to Pennsy Supply officials, and the use by Drivers, Inc. of attorneys from the same law firm used by Pennsy Supply to represent in labor matters, standing alone, show that Pennsy Supply exercised centralized control over Drivers, Inc.'s labor relations.

Two other related criteria are considered by the Board to be more critical than common ownership, the last and least significant of the criteria. They are common management and interrelation of operations. The evidence of record shows that neither apply to the relationship between Pennsy Supply and Drivers, Inc. The evidence clearly shows that Pennsy Supply exercised management control of Drivers, Inc. prior to 1987, when Charles Welsh was hired as general manager of Drivers, Inc. But, that relationship ended with the hiring of Welsh, who was hired by the owners of Drivers, Inc. for the express purpose of separating the two companies. Since he was hired, Drivers, Inc. moved from Pennsy Supply's office to its own office in a rented trailer located on a parcel of land which it jointly leases with Pennsy Supply. Welsh, operating from the trailer, exercises the authority to manage all aspects of Drivers, Inc.'s day-to-day operations, subject only to policies set by the owners of the Company, without supervision by or reporting responsibility to Pennsy Supply. Within the framework of company policies established by its owners, Welsh is solely responsible for hiring, firing, and discipline of Drivers, Inc. employees; assigning work to the Company's employees,<sup>61</sup> keeping their time and attendance

records, maintaining the Company's financial records; billing and collecting for leasing of drivers; handling workmen's compensation and unemployment compensation matters for the Company; and managing the Company's labor relations. Pennsy Supply officials and supervisors have no authority to discipline Drivers, Inc. employees, determine which Drivers, Inc. employees will be assigned to work for Pennsy Supply, or reject any driver assigned by Drivers, Inc.

While some incidental vestiges of the old relationship remained after Welsh took over management of Drivers, Inc., they are minor and whether considered individually or cumulatively, are insufficient to establish managerial control by Pennsy Supply. Falling into this category of minor incidental benefits received by Drivers, Inc. employees are discounts on purchases at Pennsy Supply's retail store, invitations to attend Christmas parties paid for by Pennsy Supply, and awards from Pennsy Supply for length of service, safe driving, and good truck maintenance practices. Other minor benefits include free turkeys at Christmas and hats distributed to all who attended the Christmas parties.

One management tool used by Pennsy Supply to reduce vehicular accidents involving its trucks, including those driven by Drivers, Inc. truckdrivers, is the accident review board, which investigates accidents, makes findings of fault, and recommends disciplinary action. While Drivers, Inc. participates in this process and furnishes representatives to sit on the board, the board's findings and recommendations of disciplinary action are not binding on Drivers, Inc. and, in fact, Welsh has not accepted the findings and recommendations of the board in approximately 15 percent of the cases involving Drivers, Inc. employees. Participation in the accident review board process on this limited basis does not give Pennsy Supply managerial control over Drivers, Inc.

Considered in the aggregate, Pennsy Supply exercises no more than minimal and routine supervision of Drivers, Inc. truckdrivers, while they are on the job driving for Pennsy Supply. Drivers, Inc. selects the drivers to fill Pennsy Supply's numerical request, while Pennsy Supply dispatchers routinely assign loads and destinations. Performance of that routine, but necessary, supervisory function is neither unusual nor a significant diminution of Drivers, Inc.'s control over the terms and conditions of employment of its employees. Obviously only Pennsy Supply knows who its customers are on any given day and can tell the drivers where and when to deliver products. Evidence of such limited and routine supervision and direction by Pennsy Supply, without hiring, firing, and disciplinary authority, is insufficient to show that Pennsy Supply shares in management control of Drivers, Inc.'s, employees.

Turning to the third factor, I find insufficient evidence to establish that the operations of Pennsy Supply and Drivers, Inc. are interrelated. The testimony shows that in most respects the operations of the two companies are separate. They maintain separate offices, payrolls, bank accounts, and financial records. There is some overlapping of financial operations involved in Pennsy Supply using its computer system to issue Drivers, Inc.'s payroll checks; however, Drivers, Inc. pays Pennsy Supply for the service, and there is no evidence that the transactions take place on other than an arm's-

<sup>61</sup> The process was completed by the summer of 1990, when Welsh took over assigning work to Drivers, Inc. truckdrivers who drove low-bed trailers for Pennsy Supply's wholly owned subsidiary, Robert M. Mumma, Inc. Until Welsh took over direct supervision and accounting for this small group of drivers, they clocked in and out at the Pennsy Supply dispatchers' office, received their work assignments directly from the dispatchers, and were supervised by the dispatchers. Welsh directed them to clock in and out at Drivers,

Inc.'s trailer, issued their paychecks to them at the trailer, took over disciplinary authority over them, and assigned work to them.

length basis. Each company separately handles hiring, firing, and discipline of its own employees, and they have separate and distinct labor relationships. The employees of Drivers, Inc. are represented by a union for collective-bargaining purposes, while the employees of Pennsy Supply are not. Neither company has any control over the terms and conditions of employment of the other's employees.

The business purposes of the two companies are also separate and distinct. As noted above, Pennsy Supply is in the business of selling construction products, while Drivers, Inc. is in the business of leasing truckdrivers. Pennsy Supply has a need for truckdrivers, because it offers delivery of its products to its customers, and while it employs some truckdrivers, the number it employs is insufficient to handle its truck traffic on busy days. The business operations of the two companies overlap only when Pennsy Supply needs more truckdrivers than it employs, and leases the extra drivers it needs from Drivers, Inc. (Pennsy Supply also leases trucks *and* drivers from other companies on occasion to meet its needs.) Put another way, Drivers, Inc. does not sell construction products, and Pennsy Supply does not lease out truckdrivers. The nature of the loads hauled by Drivers, Inc. truckdrivers while leased out is irrelevant to Drivers, Inc.'s business. Pennsy Supply's use of trucks and drivers to deliver the products it sells is incidental to its main business objective, which is to sell construction products.

I find that in this case, that the independent operations of the two companies outweigh in importance the limited interrelationship resulting from the use by Pennsy Supply of leased drivers to supplement its own staff of drivers. There is insufficient interrelation of operations to support a finding that the two companies are a single employer.

The last of the four criteria to be considered is common ownership or financial control. The evidence shows that since 1985, the two companies have not shared common ownership. I find no credible evidence that there is common ownership, to any degree, of the two companies. Neither do they share common financial control. As noted above, the two companies maintain separate bank accounts, payrolls, and financial records. Drivers, Inc. leases truckdrivers to Pennsy Supply, and bills Pennsy Supply for the service. Pennsy Supply pays the invoices from Drivers, Inc. by check, and Drivers, Inc. deposits the checks it receives in its own bank account. Drivers, Inc. then transfers funds from that bank account to its payroll bank account to meet its payroll.

The compensation arrangement between Pennsy Supply and Drivers, Inc. calls for Pennsy Supply to reimburse Drivers, Inc. for all of its labor costs pertaining to the drivers leased to Pennsy Supply, including gross wages, FICA tax, sales tax, variable fees, Federal employment insurance, workmen's compensation insurance, pension contributions, and health insurance benefits. All these are labor costs, of one form or another, which Drivers, Inc., must bear for its employees, and the rate it charges for leasing drivers must take them into account, directly, by charging for each component of its labor costs separately, or indirectly, by charging a gross rate high enough to cover all labor-related expenses. Obviously, Drivers, Inc. must recoup its labor costs from its customers in order to be profitable. Drivers, Inc., like any other business enterprise, is in business to make money, not to lose it.

It is not evidence of financial control that Pennsy Supply pays for the labor costs, both direct and indirect, borne by Drivers, Inc. for its employee leased to Pennsy Supply. Drivers, Inc. is in the business of leasing drivers, and presumably its ultimate objective is to earn a profit on its business operations. Its profit margin is the amount by which its income exceeds its expenses. It is reasonable to expect, therefore, that it will charge its customer for all of its labor costs, direct and indirect, which it incurs in paying the wages and benefits of the employees it leases out.

Neither is it evidence of financial control that Pennsy Supply obtains insurance coverage for Drivers, Inc. at rates lower than Drivers, Inc. could obtain on its own, or even that it subsidizes some of Drivers, Inc.'s business insurance. The cost to Drivers, Inc. for necessary and required business insurance is an operating expense and a cost of doing business for Drivers, Inc. which it must pay out of its operating income. It is, therefore, a cost of doing business which it must ultimately charge to its customers, directly or indirectly. Because Pennsy Supply can reasonably expect that Drivers, Inc.'s costs of doing business will ultimately be charged back to it in some form under the two companies' compensation arrangement, it represents an ultimate savings to Pennsy Supply if it is able to reduce Drivers, Inc.'s insurance costs.<sup>62</sup>

Basically Pennsy Supply and Drivers, Inc. maintain an arm's-length relationship in which the two companies have separate day-to-day management, separate control over their labor relations, separate ownership, separate financial control, and no interrelationship of operations. Pennsy Supply compensates Drivers, Inc. for leasing its drivers, just as any company which obtains goods or services from another company must do. Most of the compensation is direct, in the form of ascertainable costs. A small portion of the total compensation is indirect, in the form of small subsidies given to Drivers, Inc. at some cost to Pennsy Supply. Examples of these possibly include the cost of liability insurance and the cost in excess of \$50 per month for utilities and services supplied by Pennsy Supply to Drivers, Inc.'s trailer. Some services or benefits which Pennsy Supply provides to Drivers, Inc. are furnished at no cost to Pennsy Supply. An example of this is insurance coverage provided to Drivers, Inc. at no additional charge to Pennsy Supply as an additional insured under other Pennsy Supply insurance policies. Considering both direct and indirect compensation flowing from Pennsy Supply to Drivers, Inc., I find that the total compensation package is reasonably related to the value of service performed for Pennsy Supply by Drivers, Inc., and is consistent with an arm's-length relationship.

I find that there is insufficient evidence that Pennsy Supply and Drivers, Inc. have "such identity and community of interests as [to negate] the claim that [one] is a neutral employer." *Mine Workers (Boich Mining Co.)*, supra, 301 NLRB at 875. Respondent's affirmative defense that Drivers, Inc. and Pennsy Supply are single employers or alter egos

<sup>62</sup> Small subsidies from Pennsy Supply, such as some cost to it for liability insurance coverage for Drivers, Inc. as an additional insured, and other small costs, including the cost of Christmas parties, small value gifts, and awards for length of service to Pennsy Supply, safe driving, and good truck maintenance practices, even considered in the aggregate, represent only a nominal cost to Pennsy Supply, and are insufficient to show managerial or financial control over Drivers, Inc. by Pennsy Supply.

fails. Therefore, Respondent Union's picketing of Pennsy Supply at the Paxton Street entrances to its facility on Paxton Street, and at the three construction sites, referred to above, violated Section 8(b)(4)(B) of the Act.

(c) *Struck Work and Allies*. Having found that Pennsy Supply and Drivers, Inc. are not joint employers, single employers, or alter egos, there remains Respondent Union's affirmative defense that its picketing was legal under the struck work and ally doctrines. I find that neither of these doctrines is applicable in this case.

In *Steelworkers*, 127 NLRB 823, 825 (1960), the Board said the following about "struck" work and "ally:"

When we think of "struck" work, we have in mind work which the struck employer would under normal circumstances perform himself, but because of the strike, transfers such work to an "ally."

The Board went on to say in the same case that an employer does not forfeit its neutral status by continuing "business dealings with the struck employer, in the same manner and to the same extent as it had before the strike." *Id.* at 826.

Under the ally doctrine, an employer may lose its neutral status when it allies itself with a struck employer by performing "struck" work, or work which would have been performed by the employees of the struck employer except for the strike. *Teamsters Local 743 (Macmillan Science Co.)*, 231 NLRB 1332, 1333 (1977). In Board law, the ally "doctrine has developed into two branches, one involving cases where an employer's neutrality was allegedly compromised by his performance of 'struck work,' and another involving cases where neutrality was contested on the ground that the boycotted employer and the primary employer were a single employer or enterprise." *Teamsters Local 560*, *supra*, 248 NLRB at 1213. In the instant case, I have found that Drivers, Inc. and Pennsy Supply are not a single employer or enterprise; therefore, the question that remains is whether Pennsy Supply comprised its neutrality by performing struck work.

I find that Pennsy Supply did not perform "struck" work, as an ally of Drivers, Inc., the struck employer. The work which Drivers, Inc. employees performed for Pennsy Supply under lease was not work which Drivers, Inc. had a contractual right to continue to perform and which necessarily would have been performed by Drivers, Inc. employees except for their strike against Drivers, Inc. Whether Drivers, Inc. supplied any drivers to Pennsy Supply was entirely within Pennsy Supply's discretion and at its specific request.

"A 'contract' has been defined as a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty." 17A Am. Jur. 24. For there to be a contract, "there must be the mutual assent of two or more persons competent to contract, founded on a sufficient and legal consideration, to perform some legal act or to omit to do something." 17A Am. Jur. 42. "It is frequently stated as a broad general rule that there must be mutuality of obligation in order to form a contract or in order to render it enforceable." 17A Am. Jur. 43.

Promises may be express, implied, or constructive, but "a promise to perform as long as the promisor desires is not a real promise and is not binding." 17A Am. Jur. 27. A con-

tract in which there is a promise on one side only is referred to as unilateral contract, but by nature it is more of an offer to contract. Where there are promises on the part of both parties, the contract is considered to be a bilateral contract. However, whether a contract is unilateral or bilateral must be determined on inferences from the conduct of the parties as well as from their words. "Both express contracts and implied contracts exist only where there is mutual assent between the parties . . . [and] the law makes no distinction between agreements made by words and those made by conduct." 17A Am. Jur. 38-39.

Where one makes a promise conditioned upon the doing of an act by another, and the latter does the act, the contract is not void for want of mutuality, and the promisor is liable though the promise did not at the time of the promise engage to do the act, for upon performance of the condition by the promisee, the contract becomes clothed with a valid consideration which renders the promise obligatory. [17A Am. Jur. 47.]

There appears to have been no mutuality of obligation between Pennsy Supply and Drivers, Inc. such as is needed for a bilateral contract. In this case, there was a promise by one side only. Pennsy Supply made an express, but unilateral, promise to pay certain compensation to Drivers, Inc. if it supplied drivers to Pennsy Supply at the latter's request. When Drivers, Inc. at the request of Pennsy Supply, furnished drivers to Pennsy Supply, it became entitled to performance by Pennsy Supply of its unilateral compensation promise.

Drivers, Inc., however, is under no contractual obligation to Pennsy Supply to supply drivers when Pennsy Supply requests them. There is no agreement between Pennsy Supply and Drivers, Inc. obligating Drivers, Inc. to supply a specific amount of service (i.e., how many leased drivers Drivers, Inc. is to supply) or, for that matter, any amount of service at all. Customarily, Drivers, Inc. supplies the number of leased drivers on a daily basis that Pennsy Supply requests. Over the years, that number apparently has ranged from a few drivers to 70 to 75. But, while Pennsy Supply is bound by its unilateral promise concerning the level of compensation it will pay to Drivers, Inc. for the drivers supplied to it at its request, it did not promise Drivers, Inc. that it would lease drivers from Drivers, Inc. and Drivers, Inc. undertook no obligation to supply drivers to Pennsy Supply. Pennsy Supply does not have any legal recourse against Drivers, Inc. if the latter declines to supply drivers to Pennsy Supply, and Drivers, Inc.'s only recourse against Pennsy Supply if it does lease drivers to Pennsy Supply at the latter's request is that it is entitled to the level of compensation Pennsy Supply unilaterally promised to pay.

That the new owners of Drivers, Inc. were fully aware that Pennsy Supply had no contractual obligation to lease drivers from Drivers, Inc. and Drivers, Inc. had no contractual obligation to supply them, is made abundantly clear by the testimony of Harry G. Lake Jr., the president of Drivers, Inc. which was confirmed by the testimony of Barbara Mumma, the president of Pennsy Supply. After Barbara Mumma took over as the president of Pennsy Supply following her husband's death, Lake asked her for a contract for Drivers, Inc. to provide leased driver services to Pennsy Supply, but she

declined his request for a contract, stating that she preferred to continue under the old arrangement. The record shows that no bilateral contract existed between the two companies at any time prior to that, so Lake's request for a contract represented a new direction in the relationship between Drivers, Inc. and Pennsy Supply.

Since driving Pennsy Supply trucks was not work which Drivers, Inc., the struck employer, had a contractual right or obligation to perform, it was not work which meets the definition of "struck" work, that is, work which would have been performed by the employees of the struck employer except for the strike. Since it was not "struck" work, Pennsy Supply did not become an ally of Drivers, Inc. by using its own employees to perform the work during the strike or contracting out the work to other sources of leased drivers and/or vehicles.

(d) *Summary.* Pennsy Supply clearly is the dominant partner in its relationship with Drivers, Inc. Considering that the owners of Drivers, Inc. were themselves employees of Pennsy Supply, Inc., and that virtually all of Drivers, Inc.'s business is with Pennsy Supply, there is an obvious possibility that Pennsy Supply could, if it chooses, exercise determinative control and influence over nominally independently owned Drivers, Inc.'s operations, including the hiring, firing, and discipline of its employees, and over its labor relations and the essential terms and conditions of employment of its employees, as was the situation prior to mid-1987. However, under Board law the determination of whether Pennsy Supply and Drivers, Inc. are joint or single employers or are alter egos is not based on what Pennsy Supply might be capable of doing, but on what it did do at the relevant point in time, which, in this case, is the time of the November 1990 strike against Drivers, Inc. by its employees and the Respondent Union.

For whatever reasons and motives, since mid-1987, when Drivers, Inc. moved to its own office and hired Charles Welsh as its general manager, Pennsy Supply has followed a hands-off policy towards Drivers, Inc. Considering all of the evidence, and the inferences which can be drawn from it, I find that since mid-1987, Pennsy Supply has not exercised day-to-day control over Drivers, Inc.'s operations, nor has it exerted control over the hiring, firing, or discipline of Drivers, Inc. employees, or the assignment of work to them, or over the essential terms and conditions of their employment, or over Drivers, Inc.'s labor relations and financial affairs. And, I further find that Pennsy Supply did not become an ally of Drivers, Inc. by performing struck work during the strike which started in November 1990.

In the absence of credible evidence showing that in November 1990 Pennsy Supply and Drivers, Inc. were joint or single employers or alter egos or that Pennsy Supply became an ally of Drivers, Inc. by performing struck work during the strike, I find that Pennsy Supply was a neutral employer. Therefore, the Respondent Union violated Section 8(b)(4)(i) and (ii)(B) of the Act by picketing the three Paxton Street entrances to neutral Pennsy Supply's Paxton Street facility in Harrisburg, Pennsylvania, and three construction sites in the Harrisburg-Hershey area where Pennsy Supply delivered concrete to other neutral employers. There is convincing evidence that the unlawful purpose of the picketing was to induce and encourage employees of Pennsy Supply, Inc., not to perform work for Pennsy Supply, Inc., or at its facility,

and force other neutral employers to cease dealing with Pennsy Supply, Inc.

#### CONCLUSIONS OF LAW

1. Drivers, Inc. and Pennsy Supply, Inc. are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Respondent, Chauffeurs, Teamsters and Helpers Local Union No. 776, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. At the time employees of Drivers, Inc. and the Respondent Union began a strike against Drivers, Inc. in November 1990, and afterwards, Drivers, Inc. and Pennsy Supply, Inc., were not alter egos or joint employers, or single employers of the employees of Drivers, Inc. who were leased to Pennsy Supply on a day-to-day basis for the purpose of driving Pennsy Supply trucks.

4. Pennsy Supply, Inc. did not compromise its neutrality and become an ally of Drivers, Inc. during the strike, which was begun by the Respondent Union and the employees of Drivers, Inc. against that employer in November 1990, by performing struck work which, but for the strike, would have been performed by the employees of struck employer Drivers, Inc.

5. Respondent Union, at various times in November and December 1990, engaged in unfair labor practices in violation of Section 8(b)(4)(i) and (ii)(B) of the Act by picketing the three entrances on Paxton Street to Pennsy Supply's Paxton Street facility in Harrisburg, Pennsylvania, for the purpose of enmeshing Pennsy Supply, Inc., with whom it had no labor dispute, in the strike by the employees of Drivers, Inc. and the Respondent Union against Drivers, Inc. and for the purpose of inducing and encouraging employees of Pennsy Supply, Inc., and other employers, not to perform work for Pennsy Supply, Inc., or at that facility.

6. On or about November 8 and 9, 1990, Respondent Union engaged in unfair labor practices in violation of Section 8(b)(4)(i) and (ii)(B) of the Act by picketing the Sand Beach Road entrance to the Hershey Foods Corporate Center construction project in Hershey, Pennsylvania, for the purpose of enmeshing Pennsy Supply, Inc. and Rice & Weidman Company, which were neutral secondary employers with whom it had no labor dispute, in its strike against Drivers, Inc. and for the purpose of inducing and encouraging employees of Pennsy Supply, Inc. and Rice & Weidman not to perform work at the site, and to force Rice & Weidman and other secondary employers to cease dealing with Pennsy Supply, Inc.

7. On or about November 12, 1990, and on other divers dates in November 1990, Respondent Union engaged in unfair labor practices in violation of Section 8(b)(4)(i) and (ii)(B) of the Act by picketing the entrance to the Hershey Medical Center construction site in Hershey, Pennsylvania, for the purpose of enmeshing Pennsy Supply, Inc., H. B. Alexander, and Reliance Drilling Co., which were neutral secondary employers with whom it had no labor dispute, in its strike against Drivers, Inc., and for the purpose of inducing employees of Pennsy Supply, H. B. Alexander, and Reliance Drilling Co. not to perform work at the site, and to force H. B. Alexander and Reliance Drilling Co. and other neutral

secondary employers to cease dealing with Pennsy Supply, Inc.

8. On or about November 9, 13, and 16, 1990, Respondent Union engaged in unfair labor practices in violation of Section 8(b)(4)(i) and (ii)(B) of the Act by picketing the the Crooked Hill Road and Elmerton Avenue entrances to the U.S. Postal Service construction site in Harrisburg, Pennsylvania, for the purpose of enmeshing Pennsy Supply, Inc., and Baker Concrete Co., which were neutral secondary employers with whom it had no labor dispute, in its strike against Drivers, Inc. and for the purpose of inducing employees of Pennsy Supply, Inc., and Baker Concrete Co. not to perform work at the site, and to force Baker Concrete Co. and other neutral secondary employers to cease dealing with Pennsy Supply, Inc.

9. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

#### REMEDY

Having found that Respondent Teamsters Local Union No. 776 violated Section 8(b)(4)(i) and (ii)(B) of the Act, I recommend that Respondent be ordered to cease and desist, and to take certain affirmative action designed to effectuate the purposes of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>63</sup>

#### ORDER

The Respondent, Chauffeurs, Teamsters and Helpers Local Union No. 776, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Inducing or encouraging any individual employed by Pennsy Supply, Inc., or any other persons engaged in commerce, or in an industry affecting commerce, to engage in a strike or a refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle any goods, articles, materials, or commodities or to perform any services for Pennsy Supply, Inc., where an object thereof is to force or require the employees of Pennsy Supply not to perform work for Pennsy Supply, Inc.

(b) Inducing or encouraging any individual employed by Rice & Weidman Company, H. B. Alexander, Reliance Drilling Co., and Baker Concrete Co., or any other persons engaged in commerce, or in an industry affecting commerce, to engage in a strike or a refusal in the course of their employment to use, process, or otherwise handle any goods, articles, materials, or commodities manufactured, sold, delivered, or otherwise handled by Pennsy Supply, Inc., where an object thereof is to force or require the above-named Employers, or any other person engaged in commerce or in an industry affecting commerce, to cease using, selling, handling, transporting, or otherwise dealing in the products of, or cease doing business with, Pennsy Supply, Inc.

<sup>63</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(c) In any manner threatening coercing or restraining H. B. Alexander, Reliance Drilling Co., and Baker Concrete Co., or any other person engaged in commerce or in an industry affecting commerce, where an object thereof is to force or require the above-named Employers, or any other persons engaged in commerce, to cease using, selling, handling, transporting, or otherwise dealing in the products of, or cease doing business with, Pennsy Supply, Inc.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Post at its business offices and meeting halls copies of the attached notice marked "Appendix."<sup>64</sup> Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to the members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Furnish the Regional Director for Region 4 with signed copies of the aforesaid notice for posting by Pennsy Supply, Inc., H. B. Alexander, Reliance Drilling Co., and Baker Concrete Co., should they be willing, at all places where notices to their employees are customarily posted.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

<sup>64</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

#### APPENDIX

#### NOTICE TO MEMBERS POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT, nor will our officers, business representatives, business agents, or anyone acting for us, induce or encourage any individual employed by Pennsy Supply, Inc. to engage in a strike or refusal in the course of employment to perform any services, or work, for Pennsy Supply, Inc.

WE WILL NOT, nor will our officers, business representatives, business agents, or anyone acting for us, induce or encourage any individual employed by Rice & Weidman Company, H. B. Alexander, Reliance Drilling Co., or Baker Concrete Co., or any other person engaged in commerce or in an industry affecting commerce, to engage in a strike or refusal in the course of employment to use, process, transport, or otherwise handle, or work on any goods, articles, materials, or commodities, or to perform any services, where an object thereof is to force or require the above-named Employers, or any other person engaged in commerce or in an industry affecting commerce, to cease using, selling, han-

dling, transporting, or otherwise dealing in the products of, or cease doing business with, Pennsy Supply, Inc.

WE WILL NOT threaten, coerce, or restrain Rice & Weidman Company, H. B. Alexander, Reliance Drilling Co., or Baker Concrete Co., or any other persons engaged in commerce or in an industry affecting commerce, where an object

thereof is to force or require the above-named employers, or any other persons engaged in commerce, to cease using, selling, handling, transporting, or otherwise dealing in the products of, or cease doing business with, Pennsy Supply, Inc.

CHAUFFEURS, TEAMSTERS AND HELPERS  
LOCAL UNION NO. 776